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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

SAMY A. MANKARIOUS AND THOMAS K. MURPHY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED FOR REVIEW

I. IN A MONEY LAUNDERING CASE WHERE THE UNDERLYING PREDICATE OFFENSE IS MAIL FRAUD, MUST THE GOVERNMENT PROVE THAT THE OFFENSE OF MAIL FRAUD OCCURRED PRIOR TO THE FINANCIAL TRANSACTION PURPORTED TO CONSTITUTE MONEY LAUNDERING?

II. DOES THE AMENDMENT OF AN INDICTMENT VIOLATE AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS WHERE, RATHER THAN STRIKING SURPLUSAGE, THE AMENDMENT CHANGES THE SCHEME OF THE OFFENSE SPECIFIED IN THE INDICTMENT?

III. DOES THE DISTRIBUTION OF FUNDS TO A CORPORATE BANK ACCOUNT CONSTITUTE THE "CONCEALMENT" REQUIRED BY THE MONEY LAUNDERING STATUTES WHERE THE CORPORATION IS SOLELY-OWNED BY THE ACCUSED.

LIST OF PARTIES BELOW

The United States of America and the Petitioners, Samy A. Mankarious and Thomas K. Murphy, were the parties to the proceeding in the court whose judgment is sought to be reviewed. Prior to a severance order by the district court, Norman Lo Presto, Jr. and Delta Group, Inc., were also parties to this action.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i
LIST OF PARTIES BELOW ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTIONAL GROUNDS 1
STATUTES INVOLVED 1
STATEMENT OF THE CASE 2
ARGUMENT IN SUPPORT OF WRIT 8

I. THE SEVENTH CIRCUIT'S RULING THAT IN A MONEY LAUNDERING CASE WHERE THE UNDERLYING PREDICATE OFFENSE IS MAIL FRAUD THE GOVERNMENT NEED NOT PROVE THAT A MAILING OCCURRED PRIOR TO THE FINANCIAL TRANSACTION CONSTITUTING THE LAUNDERING CONFLICTS WITH PRIOR RULINGS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS 8

II. THE GOVERNMENT'S AMENDMENT OF THE INDICTMENT VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS 13

III. WHERE A CORPORATION IS SOLELY-OWNED BY THE ACCUSED, DISTRIBUTION OF PROCEEDS TO A CORPORATE ACCOUNT DOES NOT CONSTITUTE THE CONCEALING OR DISGUISING OF THOSE PROCEEDS REQUIRED TO SUSTAIN A CONVICTION UNDER THE MONEY LAUNDERING STATUTE 19

CONCLUSION 24

PAGE

APPENDIX A-0
Appeals Court Decision:
United States v. Mankarious, 151 F.3d 694 (7th Cir. 1998) A-1
District Court Orders:
United States v. Mankarious, No. 95-CR-96 (E.D. Wis. September 3, 1996) A-37
United States v. Mankarious, No. 95-CR-96 (E.D. Wis. February 28, 1997) A-41
United States v. Mankarious, No. 95-CR-96 (E.D. Wis. August 27, 1997) A-43
U.S. Const. amend. V A-46
18 U.S.C. § 1341 ..... A-47
18 U.S.C. § 1956(a)(1)(B) A-47
Affidavit of Terry E. Mitchell A-48

TABLE OF AUTHORITIES

CASES

PAGE

Schmuck v. United States, 489 U.S. 705 (1989) 10, 11, 13

Stirone v. United States, 361 U.S. 212 (1960) .. 16, 17

United States v. Brooks, 748 F.2d 1199 (7th Cir. 1984) 10

United States v. Cabrales, __ U.S. __, 118 S. Ct. 1772 (1998) 8, 13

PAGE

United States v. Christo, 129 F.3d 578 (11th Cir. 1997) 9, 10

United States v. Cook, 745 F.2d 1311 (10th Cir. 1984) 14

United States v. Crockett, 979 F.2d 1204 (7th Cir. 1992) 13

United States v. Dobbs, 63 F.3d 391 (5th Cir. 1995) 21

United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991) 9, 22

United States v. Edwards, 105 F.3d 1179 (7th Cir. 1997) 18

United States v. Garcia-Emanuel, 14 F.3d 1469 (10th Cir. 1994) 21

United States v. Jackson, 935 F.2d 832 (7th Cir. 1991) 20

United States v. Johnson, 971 F.2d 562 (10th Cir. 1992) 9, 10, 23

United States v. Kennedy, 64 F.2d 1465 (10th Cir. 1995) 9, 10

United States v. La Brunerie, 914 F. Supp. 342 (W.D. Mo. 1995) 22

United States v. Leichtnam, 948 F.2d 370 (7th Cir. 1991) 14-17

PAGE

United States v. Mankarious, 151 F.3d 694 (7th Cir. 1998) 1

United States v. Mankarious, Case No. 95-CR-96 (E.D. Wis. September 3, 1996) 1

United States v. Mankarious, Case No. 95-CR-96 (E.D. Wis. February 28, 1997) 1

United States v. Mankarious, Case No. 95-CR-96 (E.D. Wis. August 27, 1997) 1

United States v. Nattier, 127 F.3d 655 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1398 (1998) 20

United States v. Norman, 143 F.3d 375 (8th Cir. 1998) 20

United States v. Pedigo, 12 F.3d 618 (7th Cir. 1993) 19

United States v. Quintanilla, 2 F.3d 1469 (7th Cir. 1993) 14, 18

United States v. Rockelman, 49 F.3d 418 (8th Cir. 1995) 20

United States v. Sampson, 371 U.S. 75 (1962) 10, 11, 13

United States v. Sanders, 928 F.2d 940 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991) 20, 21

PAGE

United States v. Savage, 67 F.3d 1435 (9th Cir. 1995), *cert. denied*, 516 U.S. 1136 (1996) 8, 23

United States v. Tencer, 107 F.3d 1120 (5th Cir. 1997) 21

United States v. Willey, 57 F.3d 1374 (5th Cir. 1995) 21

STATUTES AND OTHER RELEVANT AUTHORITIES

PAGE

18 U.S.C. § 1341 ..... 2, 10

18 U.S.C. § 1343 15

18 U.S.C. § 1956 13

18 U.S.C. § 1956(a)(1)(B) 2, 19

28 U.S.C. § 1254(1) 1

Petitioners Samy A. Mankarious and Thomas K. Murphy respectfully pray that this Court issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered on August 7, 1998.

OPINIONS BELOW

The opinion in the United States Court of Appeals for the Seventh Circuit is *United States v. Mankarious,* 151 F.3d 694 (7th Cir. 1998), which is reproduced in the appendix to this petition. The district court entered several orders relevant to the issues presented herein, including its bench order related to Petitioners' motion at the close of the government's case to dismiss counts 9-17, *United States v. Mankarious,* Case No. 95-CR-96 (E.D. Wis. September 3, 1996), its written order dismissing counts 9 and 10, *United States v. Mankarious,* Case No. 95-CR-96 (E.D. Wis. February 28, 1997), and its written order denying Petitioners' motion to dismiss counts 21-27. *United States v. Mankarious,* Case No. 95-CR-96 (E.D. Wis. August 27, 1997). These orders also are reproduced in the appendix.

JURISDICTIONAL GROUNDS

The judgment and decision sought to be reviewed was entered in the United States Court of Appeals for the Seventh Circuit on August 7, 1998. This Court has jurisdiction to review that decision by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

One issue in this case is whether the amendment of the indictment violated Petitioners' constitutional rights, specifically the Fifth and Sixth Amendments to the United States Constitution. These amendments are reproduced in

the appendix. Also at issue is the interrelationship between mail fraud, 18 U.S.C. § 1341, and money laundering, 18 U.S.C. § 1956(a)(1)(B). The relevant portions of these statutes are reproduced in the appendix.

STATEMENT OF THE CASE

This case involves criminal convictions arising from Petitioners' co-ownership and operation of Delta Group, Inc. (Delta), a smelting facility located in Muskego, Wisconsin. Following almost three years of investigation of the aluminum smelting industry, during part of which Petitioners assisted in the government's investigation, an indictment was issued on May 25, 1995, charging Petitioners with mail and wire fraud, tax violations and a forfeiture count. After the district court dismissed the forfeiture count, the government sought and obtained a superseding indictment which restructured the charges, eliminated the dismissed forfeiture count and added several money laundering and receiving stolen property charges. The latter charges and a separate conspiracy count, counts 18-20 of the superseding indictment, accused not only Petitioners, but also Delta and another individual, Norman Lo Presto. Subsequently, those counts were severed and Petitioners' case proceeded to trial on fraud and money laundering charges related to two separate conspiracies to defraud Delta, along with tax violations.

One conspiracy, referred to as the UPEC conspiracy, charged that Petitioners acted in conjunction with UPEC's owner, Ed Brown, to defraud Delta either by paying for work which was not actually performed or by overpaying for work which was performed and then splitting the proceeds generated. Those allegations gave rise to eight mail fraud counts and nine counts of money laundering. The indictment

expressly stated that the specified unlawful activity underlying the money laundering charges was "mail fraud."

The district court dismissed the mail fraud counts at the close of the government's case because the government failed to prove a mailing in furtherance of a scheme to defraud. (A-9). The court considered Petitioners' motion to dismiss the money laundering counts on several grounds, including the government's failure to prove a completed mail fraud -- that any mailing in furtherance of a scheme to defraud occurred -- prior to any financial transaction involving the proceeds of a mail fraud. (A-37-A-41). The court initially denied that motion, (*id.*), but ultimately dismissed two of the nine money laundering counts in ruling on Petitioners' postconviction motions. (A-42).

The other conspiracy, referred to at trial as the MBI conspiracy, originally charged that Petitioners, along with a man named Roger Green, defrauded Delta by creating "bogus" invoices for "purported" metal and engaging in a kickback scheme. Five wire fraud counts and two money laundering counts were premised on those allegations. Prior to trial, however, the government broadened those charges to allege a general scheme involving various inflated invoice theories.

This broadening of charges related to the MBI conspiracy resulted from the government's motion filed on May 6, 1996, three months before trial and eight months after filing the superseding indictment, to strike as "surplusage" the entire second paragraph contained in the preamble to the wire fraud alleged in counts 21-25. The second paragraph stated:

> Mankarious instructed Roger Green to create fraudulent and inflated invoices from Metal Brokers which were submitted to Delta for

> aluminum purportedly sold by Metal Brokers to Delta.

The government also moved to strike the word "the" in paragraph three, changing the reading from "Mankarious and Murphy, using their corporate positions at Delta caused Delta to pay *the* bogus Metal Brokers' invoices . . . ." to "caused Delta to pay bogus Metal Broker invoices." Finally, the government moved to strike paragraph five of the preamble which indicated how much Petitioners received from the inflated invoice scheme.

The government contended that the proposed amendment in fact narrowed the indictment because, as originally charged, it encompassed three different ways the grand jury alleged Petitioners defrauded Delta: (1) fraudulent and inflated invoices involved in commission kickbacks from MBI to Petitioners through distributions to business entities they personally controlled; (2) fraudulent invoices for aluminum sold by MBI to Delta; and (3) payments by Delta to MBI for aluminum MBI allegedly shipped on behalf of Delta -- payments which were then partially kicked back to Petitioners through distributions to business entities they personally controlled. The defense did not object to the amendment, relying on the representations made to the court and counsel regarding the grand jury evidence. It was not until after trial, when Petitioners were for the first time provided with all of the grand jury testimony presented in support of the superseding indictment, that the defense first learned that the government's representations were not factual.

Instead of narrowing the indictment, the government's motion striking the bogus invoice scheme as "surplusage" in fact broadened the indictment in that it allowed the government to present evidence and argument to the trial jury relating to its theory that the wire fraud scheme

alleged in counts 21-25 involved inflated commissions and accounts receivable financing, even though those theories were never presented to or considered by the grand jury.

This case is unusual in that there was a superseding indictment and the Assistant United States Attorney who presented that indictment carefully explained to the grand jury why the new indictment was necessary, what the differences were and what the schemes charged in the indictment were, both through his colloquy and questions of the special agent leading the investigation. On December 20, 1994, the agent described the scheme to the grand jury as follows:

> And what -- eventually Roger Green and Sam Mankarious got their heads together. They decided that they had several ways of doing this. They would divert metal, they would show on invoices shipping of metal that was never shipped. There would be money transferred from Delta Group to Met-Al Brokers. Some of the money would be paid back to Delta Group and the rest of the money would be diverted to several companies that were either owned or controlled by Sam Mankarious or Tom Murphy, and that's basically what happened.

Thereafter, the agent described a separate scheme, eventually charged in the severed counts (counts 18-20), which involved Delta receiving stolen aluminum, but then again described the fraud scheme:

> In one instance there was some invoices that were actually prepared by Metal Brokers for a series of truckloads of metal, and there was a payment made of almost 1 million to Metal

> Brokers by Delta, and this was in the early part of June 1992. This was described by Roger Green as one of the instances when a large invoice shipment never happened. There was never any metal that was transferred . . .

Green also testified before the grand jury regarding the scheme to defraud:

> Q Can you describe to the grand jury what Mr. Mankarious proposed to you as a means of working together to your mutual benefit?
>
> A Yes, sir. Basically what he did was he faxed down instructions that were directed to be the setting up of invoices, weights, truckload amounts that would be invoiced back to him for funds.
>
> Q And were these weights and truckloads weights and truckloads relating to actual shipments that had been made either by Delta or to Delta?
>
> A No. At that time there was no truckload that in reality did exist.

Finally, once again the agent described the scheme as follows:

> A Well, Mr. Green said that Delta dash invoices were actually fraudulent invoices involving the sale of metal, either from Delta Group to Metal Brokers, from Metal Brokers to Delta

> Group. I haven't really been able to establish the, the exact purpose of these invoices. It does appear that it was to generate some kind of cash flow between Metal Brokers and Delta Group.
>
> It looks like there was dash 1, 2, 3, 4, 5 and 6 invoices. Each one of these groups of invoices may have accounted for as much as a million pounds of aluminum. It appears that at least four of these six groups of invoices involving the dash material was never really sent. The material never existed. The invoices represented material which was never bought or sold. It's only paper transfers.

Any fair reading of the grand jury transcripts leads to only one conclusion: Petitioners were charged with a specific scheme involving purported sales of nonexistent metal from MBI to Delta which caused Delta to pay the bogus invoices.

Counts 26 and 27 of the indictment, the money laundering counts in the MBI conspiracy, alleged that Petitioner Murphy laundered proceeds of the wire fraud described in counts 21-25 when a $7,896 check from Gamma Metals was deposited in the bank account of his corporation, Seasonal Merchandise, on June 5, 1992. Count 27 alleged that Petitioner Mankarious laundered funds when he deposited a check in the amount of $28,058 into the bank account of his corporation, S.A.M. Trading. The record is undisputed that Murphy is the sole owner of Seasonal

Merchandise and Mankarious is the sole owner of S.A.M. Trading.

Petitioners filed postconviction motions seeking dismissal of the MBI conspiracy wire fraud and money laundering counts both immediately after the trial and after reviewing the grand jury transcripts which were not provided to them until June 1997. The court denied the motions on both occasions. (A-42; A-46).

ARGUMENT IN SUPPORT OF WRIT

I. THE SEVENTH CIRCUIT'S RULING THAT IN A MONEY LAUNDERING CASE WHERE THE UNDERLYING PREDICATE OFFENSE IS MAIL FRAUD THE GOVERNMENT NEED NOT PROVE THAT A MAILING OCCURRED PRIOR TO THE FINANCIAL TRANSACTION CONSTITUTING THE LAUNDERING CONFLICTS WITH PRIOR RULINGS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

The Seventh Circuit determined below that a defendant may be convicted of money laundering predicated on the specified unlawful activity of mail fraud even if the government fails to prove that the mail fraud was completed -- that there was a mailing -- prior to the financial transaction giving rise to the money laundering charge. The court reached this conclusion despite acknowledging decisions seemingly to the contrary by this Court, *United States v. Cabrales*, 118 S. Ct. 1772, 1773 (1998) (stating that the money laundering statutes "interdict only the financial transactions . . . not the anterior criminal conduct that yielded the funds allegedly laundered"), the Ninth Circuit, *United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995) (describing proceeds as "funds obtained from prior, separate

criminal activity"), *cert. denied*, 516 U.S. 1136 (1996), the Tenth Circuit, *United States v. Kennedy*, 64 F.2d 1465, 1477 (10th Cir. 1995) (to sustain a conviction under the money laundering statutes, the financial transaction must take place after the underlying crime has been completed), *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992) ("One might logically infer that Congress could have intended sec. 1957 to apply when the underlying criminal activity occurs simultaneously with a monetary transaction with the proceeds of the activity. . . . Yet, both the plain language of sec. 1957 and the legislative history behind it suggest that Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity."); *United States v. Edgmon*, 952 F.2d 1206, 1214 (10th Cir. 1991) ("Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.'"), and the Eleventh Circuit, *United States v. Christo*, 129 F.3d 578, 580 (11th Cir. 1997) ("the underlying criminal activity must be complete before money laundering can occur"). (A-18-A-19).

The Seventh Circuit justified its holding by first stating that those courts used the language of time to describe the relationship between the money laundering and the predicate offense, resulting in rulings that the predicate offense must be "completed" or "earlier" or "antecedent," (A-18), and then asserting that those cases involved different questions from those presented in Petitioners' case. (A-19). Setting itself up as the interpreter of what the other circuits really meant, the court below concluded that at least two of the cases, *Christo* and *Johnson*, really "stand for the rule that the predicate offenses must produce proceeds before anyone can launder those proceeds." (A-21). Thus, according to the Seventh Circuit, time is important, but it is the timing of the receipt of proceeds, and not the timing of the completed predicate offense, which controls.

This conclusion is clearly contrary to the unequivocal statement by the Eleventh Circuit that "the underlying criminal activity must be *complete* before money laundering can occur." *Christo*, 129 F.3d at 580. It also contradicts the clear statement by the Tenth Circuit in *Johnson*: "Whether or not the funds that were wired to the defendant were 'criminally derived property' depends upon whether they were proceeds obtained *from a criminal offense* at the time the defendant engaged in the monetary transaction." 971 F.2d at 569-70 (emphasis added). The Tenth Circuit itself interpreted *Johnson* in *Kennedy*, where that court again held; "All that is required to violate sec. 1956 is a transaction meeting the statutory criteria that takes place *after the underlying crime has been completed*." *Kennedy*, 64 F.3d at 1477 (emphasis added). As that court stated, "the central inquiry in a money laundering charge is determining when the predicate crime became a 'completed' offense." *Id.*

The flaw in the Seventh Circuit's holding is that it assumes the only relevant factor is the timing on the receipt of the proceeds of the offense. If, however, as the other circuits have held, the underlying predicate offense must be *completed* prior to the financial transaction, then the government must prove that all elements of a mail fraud were completed before the laundering.

To convict an individual of mail fraud under 18 U.S.C. § 1341, the prosecution must prove beyond a reasonable doubt that the defendant participated: (1) in a scheme to defraud (2) by mailing or knowingly causing another to mail a letter or other matter (3) for the purpose of executing the scheme. *United States v. Brooks*, 748 F.2d 1199, 1202 (7th Cir. 1984). The Seventh Circuit cited *Schmuck v. United States*, 489 U.S. 705 (1989), and *United States v. Sampson*, 371 U.S. 75 (1962), for their holdings that mailings such as "lulling letters" sent after a defendant receives proceeds are sufficient

to constitute the mailings required to sustain a mail fraud conviction. Had those mailings not been deemed sufficient, the defendants in those cases would not have been guilty of the offense of mail fraud, because the statutorily-mandated elements of the offense would not have been met. In other words, the offense of mail fraud would not have been "completed" because there was no mailing.

Schmuck and *Sampson* did not involve the interrelationship between mail fraud and money laundering; however, they are useful in determining when the offense of mail fraud would have been completed in this case. The district court, at the close of the government's case, dismissed all of the mail fraud counts charged in the indictment on grounds that the government did not prove mailings in furtherance of the scheme; thus, the government could not rely on the charged mailings. The court ruled, however, that the government could rely on *any* mailings to prove the money laundering charges, including mailings which post-dated the charged money laundering offenses, and so instructed the jury. (A-40-A-41).

The money laundering counts alleged conduct on January 9, 1992, January 30, 1992, February 26, 1992, February 28, 1992, March 25, 1992, April 4, 1992 and June 16, 1992. In closing argument, the government invited the jury to base its verdict on a letter dated September 26, 1992. The prosecutor referred to that letter as "the first mailing. And I believe extremely strong mailing that you can prove of -- mailing that you can consider clearly in furtherance of the scheme." Thus, the jury was told that the strongest evidence of the mailing required for the predicate offense of mail fraud occurred over three months *after* the last charged money laundering.

Later, in response to Petitioners' postconviction motions, the district court dismissed the two money laundering

counts which were first in time, both January 1992 charges. (A-42). While the court's order simply dismissed those counts, the order infers that the court accepted Petitioners' argument that the mailing must precede the date of the alleged money laundering. The government had conceded in its postconviction memorandum that proof of a mailing prior to the financial transaction was required and the government had presented no evidence of any mailing prior to those dates. Unfortunately, this ruling, which clearly contradicts the court's instruction to the jury on the timing of the required mailing, occurred after the verdict and never was communicated to the jury. Thus, Petitioners' never had a jury decide whether the government proved that a mailing, and therefore a completed mail fraud, occurred prior to any of the UPEC conspiracy money laundering charges of which they were convicted.

This case illustrates the unwieldy complications which arise without a definitive statement by this Court with respect to whether all of the elements of the predicate offense must be completed and committed prior to the conduct allegedly constituting money laundering. The government initially relied upon the mailings identified in the mail fraud counts of the indictment and Petitioners' entire defense focused on those mailings. When the district court ruled that the government had failed to prove those mailings after the government rested its case, the government searched the record for other mailings which it could utilize to support the money laundering counts, ultimately relying on mailings which occurred after the alleged money laundering conduct. Based on the court's prior ruling (A-40-A-41), the government was allowed to argue to the jury that any mailing, regardless of when it was sent, could be considered as proof of mailing required for the predicate offense of mail fraud. The jury convicted Petitioners of all nine money laundering counts. After the verdict, the court apparently changed its opinion and dismissed the two money laundering counts which predated any mailing the government proved.

The Seventh Circuit's determination that the government need not prove the occurrence of a completed mail fraud, including the requisite mailing, prior to the date of the monetary transaction allegedly constituting money laundering under 18 U.S.C. § 1956 conflicts with decisions of the Ninth, Tenth and Eleventh Circuits and, inferentially, with this Court's rulings in *Cabrales*, *Schmuck* and *Sampson*. An opinion by this Court would resolve this conflict among the circuits and also would eliminate any question as to the appropriate instruction to be given to the jury, thereby eliminating the possibility of a money laundering conviction based upon a predicate offense which, at the time of the monetary transaction, was neither predicate nor a criminal offense. For all of these reasons, Petitioners respectfully urge this Court to grant a writ of certiorari to address and resolve this conflict and, ultimately, to reverse their convictions.

II. THE GOVERNMENT'S AMENDMENT OF THE INDICTMENT VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." Under the Grand Jury Clause of the Fifth Amendment, "the possible bases for conviction are *limited to those contained in the indictment*." *United States v. Crockett*, 979 F.2d 1204, 1210 (7th Cir. 1992) (emphasis added). By changing the scheme which comprised an essential element of the wire fraud charge, the government broadened the basis of the Petitioners' liability on those counts to merely *any* scheme, thereby violating Petitioners' Fifth Amendment rights.

The amended language was contained in the preamble to counts 21-25, all of which charged Petitioners with wire

fraud. The wire fraud counts were, in turn, the specified unlawful activity which gave rise to the money laundering charges in counts 26 and 27.

The Seventh Circuit adopted the government's arguments without significant analysis, ultimately concluding that the government's amendment may have changed the theory of the government's case, but it did not change the charges against Petitioners. This conclusion ignores that court's own precedent in *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991).

In its brief below, the government posited that the amendment did not change any essential element of the offense and therefore was within the scope of permissible amendments described in *United States v. Quintanilla*, 2 F.3d 1469 (7th Cir. 1993). The court below also noted the government's argument that the amendment met the five factor test set forth by the Tenth Circuit in *United States v. Cook*, 745 F.2d 1311, 1316-17 (10th Cir. 1984), holding that a deletion: "(1) may not strike any portion of the charging paragraph, (2) may not change the charged offense, (3) must be definite and certain, (4) may not take the defendant by surprise, and (5) may not prevent the defendant from introducing evidence available before the change." (A-12).

What the Seventh Circuit failed to address is a critical distinction between *Quintanilla* and *Cook* and Petitioners' case. *Quintanilla* involved a prosecution for interstate transportation of stolen property, not a scheme to defraud. That court held that the government's amendments of the indictment to remove any reference to a scheme to defraud did not materially alter the indictment because a scheme to defraud is not an essential element of the crime of transporting stolen checks. *Cook* involved charges of willfully making false representations on a currency transaction report and giving a false name and social security

number with intent to deceive. While the *Cook* court characterized those charges as arising from a scheme to conceal ownership of funds from the Internal Revenue Service, a scheme to defraud is not an essential element of either of the offenses charged in that case.

In the case below, however, a scheme to defraud is an essential element of the wire fraud charges against Petitioners and, because wire fraud is the predicate offense, to the MBI conspiracy money laundering charges. The wire fraud statute specifically provides that "[w]hoever, *having devised or intended to devise any scheme* or artifice to defraud . . . transmits . . . by wire . . . *for the purpose of executing such scheme* or artifice," shall be subject to a proscribed penalty. 18 U.S.C. § 1343 (emphasis added).

The indictment's inclusion of the "purportedly sold aluminum" language was not mere surplusage, but was necessary to establish a violation of the wire fraud statute. Pre-amendment, the indictment specifically referred to *the* scheme charged in the preamble, the alleged purported metal sales, as its basis for the "scheme to defraud" element of wire fraud. When the government amended the preamble, it impermissibly changed an essential element of the offense charged. The government changed the specific scheme charged by the grand jury to just *a* scheme -- a broader allegation that included the government's inflated invoices and accounts receivable financing theories.

In issuing the indictment, the grand jury made the deliberate choice of delineating the particular scheme which was in the preamble, as opposed to merely alleging *a* scheme. The Petitioners therefore had a right to rely on that scheme as the basis of the government's wire fraud charges. When the government changed the charged scheme to merely *a* scheme, the government impermissibly broadened the indictment. *See Leichtnam,* 948 F.2d at 379.

In *Leichtnam,* the defendant was indicted for having knowingly used or carried a rifle specifically identified in the firearm charge, but the jury was shown three guns and was told that it could convict the defendant if convinced that he had used a "firearm." The court held that the introduction of the two handguns in addition to the rifle identified in the indictment, combined with the jury instructions, allowed the jury to convict the defendant for having carried or used a firearm other than the rifle specified in the indictment. Thus, the jury may have convicted the defendant on charges that the grand jury never made against him.

The *Leichtnam* court noted that "the government could easily have drawn up [the] indictment to charge him simply with having used or carried a 'firearm.'" *Leichtnam,* 948 F.2d at 379. Because the government chose to frame the indictment as it did, however, the specificity of the indictment permitted a conviction *only* if the jury found that the defendant carried or used the particular rifle. *Id.*

This Court addressed a similar issue thirty years earlier in *Stirone v. United States*, 361 U.S. 212 (1960). Stirone was indicted on one alleged Hobbs Act violation where the government introduced evidence regarding a separate and unindicted act which also could have formed the basis of a Hobbs Act violation. The trial court instructed the jury that *either* of those acts would be sufficient to support a conviction. This Court disagreed and reversed the conviction, stating:

> [W]e cannot know whether the grand jury would have included in its indictment a charge that commerce of steel from a nonexistent steel mill [the other act] had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury

> convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error.

Id. at 219.

As in *Leichtnam* and *Stirone*, the specificity of the indictment in Petitioners' case permitted a conviction only if the government proved the specific scheme set forth in the indictment. The government's deletion of the specific scheme upon which the grand jury relied allowed the jury to convict the Petitioners on the basis of *any* schemes introduced, regardless of whether they were considered by or even presented to the grand jury, including the alleged accounts receivable and commissions advanced by the government. Therefore, the amendment violated Petitioners' Fifth Amendment rights to be indicted by the grand jury.

The Seventh Circuit never considered whether Petitioners waived their objection to the amendment because it concluded that there was no impermissible amendment. Petitioners nonetheless address that issue in this petition to avoid any further assertions of waiver.

In its memorandum supporting its motion to amend, the government asserted that the amendment narrowed the indictment as opposed to broadening it. Petitioners had no ability to challenge those assertions prior to trial because they did not receive the grand jury materials regarding witnesses called by the government until forty-eight hours before trial. In fact, the government failed to provide the transcript of Agent Thomas Walkner's September 1, 1995 appearance before the grand jury until well after trial. After examining that transcript and re-examining the others, defense counsel became suspicious of what really transpired before the grand jury and requested all additional grand jury transcripts. Those documents were not received until June 1997,

approximately ten months after their trial ended. It was not until after defense counsel was able to examine all of the grand jury materials that they realized that there was no evidence of other fraudulent schemes or theories presented to the grand jury.

Petitioners' post-trial review of the grand jury testimony established that the government presented one, and only one, theory to the grand jury. Not surprisingly, the only theory presented was the one theory specifically described in the indictment -- a bogus invoice scheme for metal *purportedly* sold by MBI to Delta. As indicated in counsel's affidavit (A-49-A-53), there is simply no reference to any other scheme as a basis for the indictment.

The discrepancy here is more than a simple matter of semantics unrelated to the substance of the offense charged or the sort of "useless averment" that "may be ignored" under *Quintanilla*. *Quintanilla,* 2 F.3d at 1475. And, since no evidence submitted to the grand jury supported the alleged accounts receivables or commissions schemes, the petitioners' convictions could only have been based upon evidence which falls outside the scope of the indictment. "If the grand jury specifies details, the proof and the jury charge may not depart from them in a way that constructively amends the indictment." *United States v. Edwards,* 105 F.3d 1179 (7th Cir. 1997).

The government argued that evidence of the other schemes was before the grand jury in that Agent Walkner described numerous business transactions between Delta and MBI and also obtained business records which the government subsequently used at trial to prove the other schemes. Nowhere in the grand jury materials, however, was there ever any testimony or commentary that describes "accounts receivable financing" or "inflated commissions" as being part of the scheme to defraud.

The government's amendment of the preamble to counts 21-25 did not simply narrow the indictment by removing surplusage. To the contrary, by removing the specific reference to a "purported sale of metal" scheme, the government broadened the indictment to charge Petitioners with wire fraud by means of *any* scheme. The preamble was specifically incorporated into each of counts 21-25 and, by changing it, the government impermissibly changed the charged scheme, an essential element of the crime of wire fraud. Moreover, because the wire fraud charges were the predicate offense to the MBI conspiracy money laundering charges, the. amendment also affected those counts. This impermissible amendment of an essential element of the indicted crime violated Petitioners' Fifth Amendment right to be tried on the charges issued by the grand jury, *United States v. Pedigo*, 12 F.3d 618, 631 (7th Cir. 1993), warranting review by this Court.

III. WHERE A CORPORATION IS SOLELY-OWNED BY THE ACCUSED, DISTRIBUTION OF PROCEEDS TO A CORPORATE ACCOUNT DOES NOT CONSTITUTE THE CONCEALING OR DISGUISING OF THOSE PROCEEDS REQUIRED TO SUSTAIN A CONVICTION UNDER THE MONEY LAUNDERING STATUTE.

The key to a money laundering conviction under 18 U.S.C. § 1956(a)(1)(b) is proof that the financial transaction was designed in whole or part to conceal or disguise the nature, location, source, ownership or control of the proceeds of specified unlawful activity.

With that framework in place, what constitutes concealing or disguising? Several circuit courts of appeals have considered whether a financial transaction whereby an individual places funds or other assets in the name of the

defendant's corporation or business constitutes the concealment or disguise mandated by the money laundering statutes. In the Seventh Circuit, such transactions are deemed as designed to conceal. *See United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991).

In determining whether transactions involving business accounts or titling assets in business names are designed to conceal, courts in the Eighth Circuit must consider not only whether the use of those accounts or names are designed to conceal the defendant's identity and relationship to the funds, but also whether they are designed to conceal the source of funds. Thus, in three recent cases, the Eighth Circuit has reached different conclusions. *Compare United States v. Norman*, 143 F.3d 375 (8th Cir. 1998) (purchasing Range Rover with funds drawn on business account and titling vehicle in business's name constitutes a design to conceal the source of proceeds where funds were transferred from source through undisclosed business bank accounts to vehicle); *United States v. Nattier*, 127 F.3d 655 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1398 (1998) (defendants' use of real estate business and the bank account of one defendant's father constituted attempt to conceal source of funds, even though they did not use false names), *with United States v. Rockelman*, 49 F.3d 418 (8th Cir. 1995) (defendant's appearance at realty office to purchase cabin with cash not designed to conceal, even though cabin titled in name of defendant's business, because source of proceeds was not concealed).

The Tenth Circuit also has taken a more case-by-case approach. In that circuit's seminal case, *United States v. Sanders*, 928 F.2d 940 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991), the court held that a drug dealer's titling of an automobile in a relative's name did not constitute money laundering. *Sanders* later was cited by many other courts for this proposition. Subsequently, however, in *United States v.*

Garcia-Emanuel, 14 F.3d 1469 (10th Cir. 1994), the Tenth Circuit reversed the district court's dismissal of several money laundering counts based on *Sanders*, holding that courts and juries "must rigorously enforce two disciplines": (1) the *Sanders* decision that "this is a concealment statute -- not a spending statute" and (2) the requirement of substantial evidence of concealment. *Id.* at 1476. Included among those dismissed but reinstated counts was a charge involving the defendant's purchase of land with a cashier's check listing his restaurant as the remitter. The court concluded that the transaction created the false impression that the source of the defendant's wealth was his restaurant and also created documentary evidence which could mislead an investigator.

While involving family member accounts and not business accounts, two recent Fifth Circuit cases also are pertinent to this Court's analysis. In *United States v. Dobbs*, 63 F.3d 391 (5th Cir. 1995), the defendant deposited some proceeds of bank fraud into his wife's bank account, converted other proceeds into cashiers checks, and then used the account and checks for various family and business expenses. The court found that evidence insufficient evidence to sustain the money laundering convictions because the transactions were "open and notorious" and no third parties were used to make purchases or hide his activity. *Id.* at 397 (citing *United States v. Willey*, 57 F.3d 1374, 1388 (5th Cir. 1995) (reversing conviction where only evidence of concealment was transfer of money from one account to another)). "The government produced no evidence that the transactions were conducted to disguise the relationship between the defendant and the fraudulent proceeds. *Dobbs*, 63 F.3d at 398. The court reached a different result, however, in *United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997), holding that Tencer's conduct inferred an attempt to conceal the nature of the funds because he consolidated the illicit funds in a city that was hundreds of miles from his home where large cash transactions are commonplace, he

asked regional banks to wire funds to an address to which he had no connection and his false statements to bank officials showed an intent to minimize attention to the transactions. *Id.* at 1130.

In Petitioners' case, the money laundering charges are based solely upon the deposits of two checks drawn on the account of Roger Green's company, Gamma Metals. The identities of both the source of the funds, Gamma Metals, and the recipients, Seasonal Merchandise and S.A.M. Trading, are open and obvious. The record is undisputed that Seasonal Merchandise and S.A.M. Trading are legitimate corporations in the fireworks business which are solely-owned by Murphy and Mankarious, respectively. The government presented no evidence as to what Petitioners did with the money after it was deposited. In essence, the government maintained that because the checks represented the proceeds of wire fraud, the mere deposit of those checks into the accounts constituted money laundering.

The issue of whether a financial transaction constitutes the concealing or disguising of funds also raises the issue of whether the funds actually have been received by the accused, thereby enabling the use of such funds in a financial transaction. Petitioners argued below that, if anything, the receipt of funds through the wire transfers and the receipt of the checks was not a laundering of proceeds but instead constituted the last step of the charged frauds -- the receipt of the proceeds. As a general rule, "proceeds involve money that comes from an outside source into the hands of the person charged with money laundering through criminal activity." *United States v. La Brunerie*, 914 F. Supp. 342 (W.D. Mo. 1995). "Money laundering statutes were created to reach post-crime transactions armed at hiding the source of 'ill gotten gains.'" *Id.* (citing *Edgmon*, 952 F.2d at 1213).

The Tenth Circuit has concluded that a wire fraud was not complete until the defendant received the proceeds of the fraud:

> The underlying criminal activity in this case was wire fraud, *which the defendant accomplished by causing the investors to wire funds to his account*. . . . Section 1957 appears to be drafted to proscribe certain transactions in proceeds that have already been obtained by an individual from an underlying criminal offense. The defendant did not have possession of the funds nor were they at his disposal until the investors transferred them to him. *The defendant therefore cannot be said to have obtained the proceeds of the wire fraud until the funds were credited to his account.*

United States v. Johnson, 971 F.2d 562, 569-70 (10th Cir. 1992) (emphasis added). The same analysis applies to money laundering under section 1956 as that statute similarly contemplates that the underlying offense be separate and complete.

Congress clearly intended the money laundering statutes to punish new conduct that occurs after the completion of certain criminal activity rather than simply to create an additional punishment for that criminal activity. The legislative history associated with section 1956 indicates that Congress designed the statutes to fill "the gap in the criminal law with respect to the post-crime hiding of ill-gotten gains." *Savage*, 67 F.3d at 1441. "It is readily apparent that criminals rely on laundering schemes to hide the identity and true source of these proceeds." *Id.* (citing S. Rep. No. 433, 99th Cong. 2d Sess. (1986) (quoting Senator Strom Thurmond)). Given the conflicting status of the law of the circuit courts of appeals as to the requirement for determining that a financial transaction

was designed to conceal or disguise proceeds, Petitioners urge this Court to take this opportunity to establish a clear and unequivocal directive that a financial transaction does not constitute money laundering unless the transaction occurs after the unlawful proceeds are received and all other elements of the predicate offense are fulfilled, *and* the transaction itself evinces an intent to conceal or disguise the proceeds. Neither of those requirements were met in Petitioners' case.

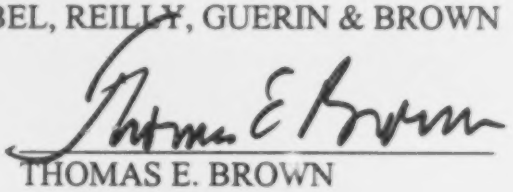
CONCLUSION

For all the foregoing reasons, petitioners Samy A. Mankarious and Thomas K. Murphy respectfully pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Dated this 4 day of November, 1998.

Respectfully submitted,

GIMBEL, REILLY, GUERIN & BROWN

By: 

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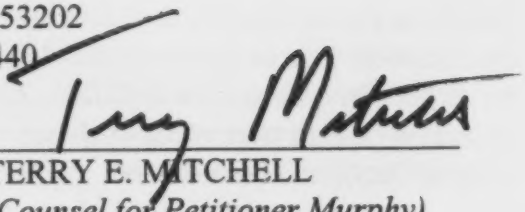

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 97-3028 and 97-3029
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAMY A. MANKARIOUS and
THOMAS K. MURPHY,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 95-CR-96 Rudolph T. Randa, Judge.

Argued May 18, 1998–Decided August 7, 1998

Before CUMMINGS, ROVNER, and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*. In this case, Samy Mankarious and Thomas Murphy offer more than a dozen reasons for reversing their convictions for money laundering, wire fraud, and filing false tax returns. They do not skimp on the sentencing issues, either, arguing at least 11 grounds for recalculating their offense levels under the federal sentencing guidelines. Before considering this veritable plethora of issues, we set out the facts, which of course are viewed in the light most favorable to the jury's verdict.

In 1989 Mankarious and Murphy launched Delta Group, Inc., an aluminum smelting company based in Muskego, Wisconsin. Over the next several years, the two used Delta

as the springboard for a variety of fraudulent schemes. At first it may sound like Mankarious and Murphy stole just from themselves, but that is not true. While the two men owned 59 percent of Delta, the remaining 41 percent belonged to WITECH, a venture capital operation run by Wisconsin Energy Corp., Wisconsin's largest utility. WITECH contributed $175,000 toward the construction of Delta's plant and, through an investment agreement, WITECH exercised significant control over fundamental business decisions at Delta. For instance, the utility closely controlled the salaries, profit shares, and benefits given to Mankarious and Murphy. Apparently the two men resented what they perceived to be low salaries. By 1992 they convinced WITECH to pay them a bonus and to lower the interest rate on a company loan. Seemingly, these concessions did not satisfy Mankarious and Murphy. The government suggests that their frustration served as a motive for their crimes. Perhaps yes, perhaps no. At any rate, we now get to the fraudulent activity that led to the indictment which led to the convictions of Murphy and Mankarious.

The first of the fraud schemes involved Ed Brown and the company he partially owned, UPEC & Associates. Brown testified for the government and provided many of the details of the following story. UPEC began its relationship with Delta in 1990 when it bid on and eventually built Delta's furnace. In the following years, Delta regularly hired UPEC. As the relationship between the two companies grew, so did the relationship between Mankarious, Murphy, and Brown. During the summer of 1990 Brown asked Mankarious and Murphy if they knew of any methods to withdraw money from a company. Murphy replied, "There's lots of ways. Stick around with us and we'll show you the reins." Mankarious then outlined a plan for Brown to bilk money out of Delta—of course, Brown would share a cut with the men from Delta.

Under this scheme UPEC performed work at Delta, with Brown submitting false invoices for each job. Mankarious and Murphy would cut checks to cover these invoices, sometimes making the checks out to a fictitious payee. Brown would endorse the checks and return them to Mankarious, who would cash them at a tavern called the Brat N Beer. At first Brown received half the proceeds, with Mankarious and Murphy splitting the other half. Later Mankarious convinced Brown to split the take evenly among the three men.

In the winter of 1990 the details of the scheme changed slightly. UPEC continued to perform work at Delta, but Brown began sending invoices to Delta from his father-in-law's Topper Manufacturing. Over the next several months Mankarious and Murphy cut eight checks to Topper totaling over $28,000. On many occasions Mankarious and Murphy co-signed the checks in front of Brown at Delta. At least once, however, Mankarious apparently took care of business alone, telling Brown not to inform Murphy. And from early 1991 until early 1992, without Brown's knowledge, Mankarious and Murphy signed five checks from Delta to Topper totaling over $23,000. Mankarious cashed these checks at the tavern. (These betrayals recall yet again that there is no honor among thieves.)

Mankarious cashed the checks at the Brat N Beer because of his close relationship with the owner, Ralph Adamczyk. Mankarious' checks were the largest that Adamczyk cashed, and Mankarious often would call just before bank closing time to make sure that Adamczyk had enough cash on hand. If the tavern owner was short, Mankarious would drive him to the bank to pick up enough cash to cover a given check. Both Adamczyk and Diana Coffey, a bartender at the Brat N Beer, testified that they never saw Ed Brown.

In mid-1991, UPEC & Associates dissolved and Brown took over a new company, UPEC, as the sole owner. The schemers concocted a new variation on their scam. Brown would inflate UPEC's invoices to Delta and then write Mankarious a kickback check. Apparently Mankarious shared this perk with Murphy. For instance, in one transaction UPEC overbilled Delta by $6,850. Delta paid the bill and Brown cut a $6,850 check to Delta. Mankarious objected and asked Brown to make the check out to one of UPEC's larger suppliers. Brown then wrote out a $6,850 check to I. Bahcall and gave it to Mankarious. On another occasion, UPEC submitted a bogus invoice for $21,500 after Mankarious demanded about that much from UPEC's comptroller, Tom Hansen. Brown told Hansen to do whatever Mankarious asked. Delta paid UPEC the $21,500 and Brown wrote a check for $10,500 to Sam's Trading (a fireworks business run by Mankarious) and another $10,500 check to Seasonal Merchandise (a fireworks business run by Murphy). UPEC seems to have submitted another bogus invoice for $26,000 paid to the two fireworks companies. Notably, throughout all these schemes Delta never took the early payment discount allowed by UPEC's invoices.

Sometimes UPEC would even bill Delta for work performed at either Mankarious' or Murphy's homes or for their businesses. For instance, Mankarious received a deck around his pool, a bay window, a paint job for his house, trailer hitches for his cars, kitchen cabinets and kitchen remodeling, roof repairs, and dollies for gun safes. Murphy received dollies and trailer hitches. Adding insult to injury, UPEC not only billed Delta for these projects but inflated the invoices as well. Thus Mankarious and Murphy reaped double benefits—the free work plus the kickback. On another occasion, UPEC paid Dave Kerr to install a furnace and an air conditioner at Murphy's house. UPEC then invoiced Delta for the bill. Following this tiny subplot, Mankarious and Murphy telephoned Hansen (UPEC's

comptroller) and told him to destroy the paper trail because Murphy was nervous. Apparently not too nervous, though—2 months later Murphy told Kerr to install an air conditioner at his parent's home. Again, Kerr billed UPEC and UPEC billed Delta.

During the summer of 1992 Mankarious and Murphy met with Brown to cook up a plan to overbill Delta by $50,000. Brown sent the invoice, received payment, and made out the kickback check to Mankarious' brother-in-law. A few months later, however, Mankarious telephoned and explained that the IRS was snooping around. He returned the money and told Brown to use it as prepayment on future bills to Delta.

Throughout the UPEC invoice scheme Brown would hand-carry the questionable invoices to Delta. Delta would cut the checks while Brown waited. According to Mankarious and Murphy, UPEC would not send duplicate invoices in the mail. According to the government, UPEC routinely sent copies through the mail.

In addition to concocting the UPEC/Brown scheme, Mankarious and Murphy also fell in with Roger Green, who ran Metal Brokers International ("MBI") out of Cape Coral, Florida. MBI ran a complex fraudulent operation through which it bought aluminum ingot from various smelters under the pretense that either GE or Emerson Electric would purchase the metal. In reality, MBI sold the metal to other buyers but used a system of cleverly named bank accounts to make it appear that the big companies paid the bill. According to the government, Green ran a Ponzi scheme, making increasingly late payments for the aluminum. *See Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995). Once the government caught up with Green, he testified against Mankarious and Murphy.

Delta began to sell metal through MBI innocently, but several late payments tipped off Mankarious, who began to investigate. He discovered that MBI was up to something and called Green. Green offered to pay him off, but Mankarious suggested that they should pursue "business opportunities" together. Green flew to Milwaukee, where he and Mankarious developed a plan. Under one part of the plan Delta received aluminum ingot through MBI at scrap prices and Green received money that he needed to keep his scam running. A Delta employee testified to the activity on Delta's loading dock—ingot arriving from Delta's competitor Met-Al (a victim of MBI), ingot piling up, ingot arriving on one truck and leaving minutes later on another.

In another part of the plan—here's where it gets really complicated—Delta shipped aluminum to MBI but billed Emerson. A cohort of Green's at Emerson intercepted the bills and sent them to MBI. Mankarious used the accounts receivable from Emerson to prop up Delta's line of credit at his bank. Delta used this line of credit to make payments to MBI for the cheap aluminum it received and to pay commissions to Green. Mankarious and Murphy paid Green an inflated commission on the shipments, and Green returned the favor by paying a $30,000 kickback to Sam's Trading (Mankarious' fireworks company). Meanwhile, Green used the money from the cheap aluminum to pay Delta for the aluminum allegedly headed to Emerson. At some point, Green created Gamma Metals to aid this plan. To make matters even more confusing, this plan is referred to variously as the "dash invoice" plan, the "drop shipment" plan, or the "accounts receivable" plan. Some of the payments involved in this scheme entailed wire transfers from an account with a name intended to mimic an Emerson account. The paperwork on this scheme included invoices to Gamma from the two fireworks companies. For instance, in June of 1992 MBI sent Murphy a $7,900 check for Seasonal Merchandise and wired Mankarious a $33,400 payment for

Sam's Trading. At the same time, Murphy signed a $986,600 check from Delta to MBI as payment on the dash invoices.

The operation was working so well that Mankarious and Murphy convinced Murphy's girl friend—Julie Witte—to create Parkfield, a warehousing business that would work with Green. Parkfield and Gamma swapped invoices and payments. Gamma sent at least one check to Parkfield care of Murphy. Witte testified that in running Parkfield she did whatever Murphy told her to do.

Unfortunately for the defendants, the government discovered Green's criminal activity in late 1992. After the government exposed Green's schemes, Mankarious and Murphy tried to cover their tracks. For instance, Green executed a security agreement, transferring cash and accounts receivable to Delta. Mankarious and Murphy assured Green that they would purge Delta's records to thwart the FBI investigation. At the same time, Mankarious returned the $50,000 to Brown and also asked him to hold a bag of $60,000 in cash because he feared an FBI search of his house. In 1993 Mankarious and Murphy met with Brown to discuss how to deal with any audits or investigations—they agreed to characterize the flow of money from UPEC to the fireworks companies as loans. Murphy gave Brown a list of checks. Mankarious told Brown to destroy records. Mankarious went so far as to meet with Brown and practice the story. Mankarious gave Brown $8,000—from himself and Murphy—and explained that Brown was a "good guy" who was doing his job to cover up the scheme.

Beyond their schemes with UPEC and MBI, Mankarious and Murphy also bilked money out of Delta by submitting their own false invoices directly to the company. For instance, Murphy billed the company for aluminum siding, a concrete driveway, a remodeled porch, and a roof.

Mankarious also billed Delta for a driveway. Both men submitted company credit card bills for personal purchases. Mankarious purchased an $1,800 gun safe and $1,000 worth of shooting supplies. Murphy purchased over $9,700 worth of guns and supplies. Delta's bookkeeper, Mark Teloh, questioned these items, but Mankarious and Murphy told him not to challenge their decisions. They told Teloh to enter the items as corporate expenses.

Mankarious and Murphy, of course, reported none of their ill-gotten gains on their federal income tax returns. Interestingly, despite their embezzling, Delta was nevertheless profitable, meeting its goals each year and increasing in value.

Mankarious and Murphy present a completely different—and unconvincing—version of the facts in their briefs. Not only do they ignore the adverse facts as determined by the jury, they present their facts—taken from cross-exams of government witnesses and direct exams of defense witnesses—as uncontroverted reality. The government charitably refers to the defense's factual recitation as an "'alternate version' of the trial." We are inclined to agree. Criminal defendants, of course, face an especially delicate task when presenting "the facts" to an appellate court. We hasten to add, however, that mentioning adverse factual findings is not the same thing as admitting to the conduct alleged by the government; nor does mentioning adverse findings preclude a defendant from explaining his or her own interpretation of the evidence.

For what it's worth, the defendants contend that Brown cashed the checks at the Brat N Beer and that Brown fabricated the false invoices on his own. Mankarious and Murphy base this assertion on testimony from three witnesses—all seriously undermined by the government's cross-examinations. At trial, defense witnesses testified that

some UPEC invoices did not include inflated prices. Mankarious and Murphy contend that the money flowing between UPEC and the fireworks companies constituted loans. At trial Mankarious explained that his large cash holdings (much of it buried in his backyard) were for his family in case something happened to him. Murphy, who did not testify, also buried money because it was a good way to "diversify" one's holdings. The defense attempts to explain away the dealings with Green by contending that Mankarious and Murphy were unwitting dupes who got sucked into Green's fraudulent schemes. Again, they claim that the money flowing to the fireworks companies constituted loans. Finally, the defense attempts to rebut charges of tax fraud by noting evidence that Murphy instructed his CPA to add some $13,000 to his income in 1992.

In any event, the various schemes of Mankarious and Murphy came to light because of the government's investigation of Green and MBI. In May of 1995 the government indicted Mankarious and Murphy for mail fraud, wire fraud, and tax fraud. In September a superseding indictment amended the charges to eight counts of mail fraud (18 U.S.C. § 1341), five counts of wire fraud (18 U.S.C. § 1343), eight counts of money laundering (18 U.S.C. § 1956(a)(1)(B)(i)) against Mankarious and three counts of money laundering against Murphy, and two counts of filing false tax returns (26 U.S.C. § 7206(1)). The indictment included other participants in the scheme and some other counts, but these counts and parties were severed or dismissed. Before trial the court dismissed the mail fraud counts on the grounds that the government did not prove that the mailings furthered the fraud. Also, shortly before trial the government amended a portion of the indictment's wire fraud preamble.

On September 5, 1996, a jury convicted Mankarious and Murphy of all the remaining counts of wire fraud, money

laundering, and tax fraud. Following the convictions the court dismissed two of the money laundering counts (counts 9 and 10) against Mankarious on the grounds that the government did not introduce sufficient evidence to prove the predicate offense of mail fraud for those charges. Mankarious and Murphy received 70-month sentences for the money laundering counts, 60-month sentences for the wire fraud counts, and 36-month sentences on the tax fraud counts. The court ordered concurrent time, for an effective sentence of 70 months. The court also ordered supervised release of 3 years, fines of $500,000 each, and joint and several restitution to Delta of $516,249.

In their first challenge to the convictions, Mankarious and Murphy allege that the government impermissibly amended the wire fraud portion of the indictment. Specifically, the defendants argue that the government did not merely strike surplusage from the indictment as it told the court when it requested the amendment.

The amendment to the indictment made three changes. First, it deleted the second paragraph of the preamble to the wire fraud charges. That paragraph read: "Mankarious instructed Roger Green to create fraudulent and inflated invoices from Metal Brokers which were submitted to Delta for aluminum purportedly sold by Metal Brokers to Delta." Second, it deleted a "the" from the third paragraph: "Mankarious and Murphy, using their corporate positions at Delta caused Delta to pay the bogus Metal Broker invoices." (Emphasis added.) Third, the amendment deleted the fifth paragraph which included the amount of money Mankarious and Murphy allegedly received.

The defense contends that these changes broadened the wire fraud portion of the indictment without the support of evidence introduced before the grand jury and thus deprived the defendants of their Sixth Amendment right to an

indictment. *See United States v. Crockett*, 979 F.2d 1204, 1210 (7th Cir. 1992). The core of this argument is that the government's main theory before the grand jury was that MBI never actually moved any metal. Later the government learned from Green that MBI really did ship metal. The government was stuck with an indictment that described one theory but wanted to argue a different theory at trial. Thus the defendants argue that the government impermissibly broadened the indictment in violation of *United States v. Leichtnam*, 948 F.2d 370, 375-76 (7th Cir. 1991). According to the defendants, this error was fundamental because it amended an essential element of the offense. *See United States v. Pedigo*, 12 F.3d 618, 631 (7th Cir. 1993). The defendants admit that they did not object to the amendment at trial, but they contend that the government belatedly supplied them with the grand jury transcripts, thus excusing their failure to speak up sooner.

The government effectively responds to these arguments. First, the government notes that the district court held a post-trial hearing to consider this issue and determined that the evidence before the grand jury encompassed several theories of the offense. The government reminds us that we should review this factual determination for clear error only. Second, the government explains that the amendment did not broaden the indictment because it modified only the preamble, not the specifics of any actual offense.

The government explains that the confusion regarding the evidence before the grand jury arose because of the several different names applied to the Green/MBI fraud scheme. The government concedes that it did not describe the scheme as an "accounts receivable financing" plot to the grand jury. But the government points out that it did present all the facts to the grand jury under the moniker of the "dash invoice" system. The government also explains that the amendment to the indictment falls within the zone of redactions permitted

by *United States v. Quintanilla*, 2 F.3d 1469, 1475 (7th Cir. 1993), which allows amendments unless they change a material element of the indictment and cause prejudice to the defendant. In addition, the government walks through the five-factor test laid out by the Tenth Circuit in *United States v. Cook*, 745 F.2d 1311, 1316-17 (10th Cir. 1984), for analyzing deletions from an indictment. Under *Cook* a deletion: (1) may not strike any portion of the charging paragraph, (2) may not change the charged offense, (3) must be definite and certain, (4) may not take the defendant by surprise, and (5) may not prevent the defendant from introducing evidence available before the change. As the government explains, the amendment did not touch the charging paragraphs and did not alter the charges in the wire fraud counts. The amendment was definite and certain—the accompanying trial memorandum specified two theories upon which the government would rely at trial. The defendants suffered no surprise because the discovery materials included all of the underlying information and the court approved the amendment over 90 days before trial. Finally, the amendment did not deprive the defendants of any evidence.

The government fleshes out its argument by explaining that the defense waived any objection to the indictment by not raising it earlier. By not objecting before trial, the defense waived the issue unless the indictment was so defective that it did not, under any reasonable construction, charge the offense of conviction. *See Lemons v. O'Sullivan*, 54 F.3d 357, 363 (7th Cir. 1995). Furthermore, a defendant must show cause and an actual miscarriage of justice to overcome waiver. *See United States v. Simone*, 931 F.2d 1186, 1192 (7th Cir. 1991). As the government notes, even if the defense shows cause, it cannot show a miscarriage of justice. Nothing in the defense case constituted a substantive defense to wire fraud. The defense simply argued that the government witnesses lied.

The amendment may have altered the substance of the indictment slightly by modifying the government's *theory* of fraud for the mail fraud counts, but it did not change the specifics of any of the *charges*, nor did it prejudice the defendants. The government's argument before and after the amendment relied on the same essential evidence. As the district judge explained: "The grand jury heard testimony concerning a broad range of mail and wire fraud schemes covered by false and fraudulent invoices. This was generally and in the Court's view clearly presented to the defendants in discovery." We will not hold it against the government that it used one label to describe the evidence before the grand jury and then improved on that description before trial. This change seems to have taken place because the government's understanding of the case grew as the trial approached, not because the government's evidence changed. Importantly, the government avoided any prejudice by informing the defense of this change in its approach by providing the defense with a trial memorandum. Therefore, because the amendment did not alter the balance significantly, we do not need to address the question of waiver.

Next, the defense makes several arguments for reversing the money laundering convictions based on mail fraud—counts 11-17. These convictions arose either out of Mankarious cashing checks at the Brat N Beer or out of the defendants depositing checks into their fireworks companies' accounts. The defendants contend that because the court dismissed the mail fraud counts in the superseding indictment, the government lacked evidence of predicate offenses necessary for money laundering. The indictment contained no identified mailings other than those in the dismissed charges. Next, the defendants argue that the government failed to give sufficient notice of specific mailings underpinning the money laundering counts. They also claim that the court allowed the jury to convict based on

a "mail fraud scheme" rather than on specific mailings. And finally, they challenge the sufficiency of the evidence that any specific mailings took place. They contend that Brown delivered all of the relevant invoices by hand and received payment by hand.

The government responds by explaining that in *United States v. Gabel*, 85 F.3d 1217 (7th Cir. 1996), we stated that money laundering does not require particular proof of a specific predicate offense. As we declared in *Gabel*:

> The offense of money laundering is the act of designing a transaction to conceal or disguise the nature or other identifying features of the property. This Court has held that the government is not required to trace the proceeds to a particular sale. *United States v. Jackson*, 983 F.2d 757, 766 (7th Cir. 1993). Put differently, this offense focuses on the conversion of the fruits of the earlier crimes into other, presumably less detectable, forms. The particular nature or time of those earlier crimes is immaterial . . . . While the statute requires that the money laundered be the fruit of an illegal act, there is no requirement that the government link the money laundered to a specific criminal act.

85 F.3d at 1224.

Similarly, in *United States v. Kennedy*, 64 F.3d 1465 1480 (10th Cir. 1995), the Tenth Circuit upheld a money laundering conviction predicated on mail fraud even though the jury acquitted the defendant of mail fraud itself. The *Kennedy* court explained that the jury could have inferred the predicate act supporting the money laundering offense from the overall fraudulent scheme—in other words, the jury could have looked to a different mailing than the one specifically charged in the mail fraud count.

And, in *United States v. Tencer*, 107 F.3d 1120, 1130-32 (5th Cir.), *cert. denied*, 118 S. Ct. 390 (1997), the Fifth Circuit took basically the same approach by affirming money laundering convictions after reversing mail fraud counts. The *Tencer* court reversed the mail fraud convictions because the government lacked evidence connecting specific instances of fraud with specific mailings. But the court explained that, given the volume and scope of the insurance fraud scheme in that case, the jury could have inferred that each of the money laundering transactions involved proceeds of mail fraud. As the *Tencer* court stated: "Because the money laundering counts do not define 'specified unlawful activity' in terms of the mail fraud activities described in counts 2-18, this court is not limited to considering only those activities." *Id.* at 1131. In other words, the court affirmed the money laundering convictions on the grounds that the evidence generally supported the inference that the laundered funds constituted the proceeds of mail fraud.

To some extent these cases all beg the question. How much proof of the predicate offense does the money laundering statute require? The government must prove that the defendant conducted a financial transaction "which in fact involves the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1). In *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990), the Eighth Circuit explained that money laundering based on the predicate offense of drug dealing does not require proof of a particular sale. Instead, *Blackman* allowed conviction based on circumstantial evidence that the funds in question came from drug dealing. Of course the *Blackman* court added that the circumstantial evidence must be "sufficient to prove that element beyond a reasonable doubt." *Id.* In *Blackman* the court explained that the jury heard enough pieces of evidence to infer that the funds in question came from drug dealing.

Our resolution of *United States v. Jackson*, 983 F.2d 757 (7th Cir. 1993), runs parallel to the Eighth Circuit's approach in *Blackman*. In *Jackson* we explained the inferences supporting a jury verdict of money laundering: The jury could conclude that Errol Jackson used drug dealing proceeds to purchase a car based on testimony that Jackson engaged in drug dealing coupled with evidence of Jackson's unexplained wealth. *See id.* at 766-67. The *Jackson* court, like the Eighth Circuit in *Blackman*, concluded that circumstantial evidence and reasonable inferences based on that evidence could satisfy the predicate offense element in § 1956. *Jackson* thus concluded by noting that the money laundering statute does not require the government to trace the laundered proceeds to a specific predicate offense.

In this case, the jury heard testimony from Mary Sikes-Brown, a UPEC employee who said that after she typed invoices she routinely mailed them. She specifically testified to mailing the invoice for work on the gun safe dollies. The government also points to testimony that Delta regularly date-stamped incoming mail and that many of the invoices in question bear date stamps. The government also notes the timing of date stamps on many invoices—often several days after the invoice date. These facts constitute sufficient circumstantial evidence for the jury to infer that UPEC mailed a file copy of each invoice to Delta. In other words, the jury could have inferred that the laundered funds came from a fraudulent scheme and that the use of the mails furthered that scheme. Therefore, we believe that the jury heard sufficient circumstantial evidence to infer that each of the checks cashed and deposited by the defendants constituted the proceeds of mail fraud.

We also reject the defendants' argument that the district court's dismissal of the mail fraud counts mandates the reversal of the money laundering convictions. As *Jackson* makes clear, a money laundering conviction does not require

proof of a specific predicate offense; it merely requires proof that the laundered funds constituted the proceeds of a predicate offense. Since a money laundering conviction does not require proof of a specific offense, we fail to see how the dismissal of the specific mail fraud charges had any effect on the money laundering counts. As in *Tencer*, the mail fraud counts detailed specific conduct while the money laundering counts did not. The money laundering counts in the indictment referred only in general terms to "specified unlawful activity, that is mail fraud." This case might come out differently, however, if the money laundering counts in the indictment specified particular predicate offenses. Indeed, two of the district court cases cited by the defendants bear out exactly this point. *See United States v. Finn*, 919 F. Supp. 1305, 1351-52 (D. Minn. 1995), *aff'd on other grounds*, 121 F.3d 1157 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1046 (1998); *United States v. D'Alessio*, 822 F. Supp. 1134, 1146 (D.N.J. 1993).

Based on the foregoing reasoning, we disagree with the defendants that the indictment contained insufficient notice. It is a logical corollary of *Blackman*, *Jackson*, and *Tencer* that if we do not require proof of a specific predicate offense to support a money laundering conviction, then we do not require the indictment to specify the predicate offense underlying a money laundering charge.

Turning briefly to the money laundering jury instructions: We might wish that the district judge had described the predicate offense with more precision rather than telling the jury that it must find that the allegedly laundered funds came from a "mail fraud scheme." District courts would do better to instruct a jury that it must find (perhaps based on inference from circumstantial evidence) that the funds involved in a money laundering offense must constitute the proceeds of a fraudulent scheme that was furthered by the knowing use of the mails. Nevertheless, we do not believe that the

instruction constituted error. Because of our willingness to allow the jury to infer the predicate offense from circumstantial evidence, and because we do not require the indictment to specify the predicate offense, we believe that even this fuzzy instruction captured the essence of the predicate offense adequately. The instruction directed the jury's attention to both critical components: the scheme to defraud and the use of the mails to execute the plan.

Perhaps anticipating their failure on these various points, the defendants attack the money laundering convictions from yet another angle. They argue that the government lacked evidence of a predicate mailing prior to the date of each money laundering charge. The defendants argue that, under *Kennedy*, the predicate act of mail fraud must be "complete" before the money laundering occurs. *See Kennedy*, 64 F.3d at 1477. The defendants are correct that many cases, including *Kennedy*, use the language of time to describe the relationship between the money laundering and the predicate offense—these cases state that the predicate offense must be "completed" or "earlier" or "antecedent." *See, e.g., United States v. Cabrales*, 118 S. Ct. 1772, 1773 (1998) (stating that the money laundering statutes "interdict only the financial transactions . . . not the anterior criminal conduct that yielded the funds allegedly laundered"); *United States v. Christo*, 129 F.3d 578, 580 (11th Cir. 1997) ("the underlying criminal activity must be complete before money laundering can occur"); *United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995) (describing proceeds as "funds obtained from prior, separate criminal activity"), *cert. denied*, 516 U.S. 1136 (1996); *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992) ("One might logically infer that Congress could have intended § 1957 to apply when the underlying criminal activity occurs simultaneously with a monetary transaction with the proceeds of the activity . . . . Yet, both the plain language of § 1957 and the legislative history behind it suggest that Congress targeted only those

transactions occurring after proceeds have been obtained from the underlying unlawful activity."); *United States v. Edgmon*, 952 F.2d 1206, 1214 (10th Cir. 1991) ("Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.'").

These cases, however, typically involve a very different question from the one confronting us. For instance, in *United States v. Christo*, 129 F.3d 578 (11th Cir. 1997), the Eleventh Circuit dealt with the laundering, under 18 U.S.C. § 1957, of proceeds obtained from bank fraud. The government contended that the act of depositing checks in a check kiting scheme constituted money laundering. The defendant countered by arguing that, because the predicate offense of bank fraud required execution (i.e., the movement of funds from the financial institution), the money allegedly laundered did not constitute the proceeds of crime until after the deposit. In other words, the defendant claimed that the last act of bank fraud could not have constituted the money laundering transaction—the two offenses needed to be separate. The *Christo* court agreed and stated that "the underlying criminal activity must be *complete* before money laundering can occur." 129 F.3d at 580. When the *Christo* court used the language of time, however, it really was just worried about the definition of proceeds. The Eleventh Circuit explained that the money laundering statutes punished transactions in proceeds, not the transactions that create those proceeds. Thus, time is important, but in a different way than Mankarious and Murphy allege. A money launderer must obtain proceeds *before* laundering can take place. The holding paragraph explains the court's concern:

> Viewing the evidence in the light most favorable to the government, we concluded that these facts are insufficient to establish that [the defendant] engaged in a

> monetary transaction that was separate from and in addition to the underlying criminal activity. The check kite did not deprive the bank of anything, nor did [the defendant] unlawfully obtain something from the bank, until Bay Bank disgorged its funds by the payment of the check to SouthTrust Bank. Thus, the withdrawal of funds charged as money laundering was one and the same as the underlying criminal activity of bank fraud and misapplication of bank funds. We do not accept that money laundering is inherent in bank fraud or misapplication of funds. We do not understand Congress to have been so subtle when it enacted the money laundering statute.

Id.

Similarly, in *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992), the Tenth Circuit considered basically the same problem in a case involving the laundering, also under § 1957, of funds derived from wire fraud. The government identified the wire deposit of funds into the defendant's account as the money laundering transaction. The defendant countered that he could not have engaged in a transaction in criminally derived property because he did not possess the proceeds of wire fraud until after the completion of the wire transfer. The court agreed. Like the *Christo* court, however, the Tenth Circuit used the language of time to express this conclusion: "Whether or not the funds that were wired to the defendant were 'criminally derived property' depends upon whether they were proceeds obtained from a criminal offense at the time the defendant engaged in the monetary transaction. We find they were not." 971 F.2d at 569-70.

In both *Christo* and *Johnson*, the courts confronted a problem arising out of attempts to define what the money laundering statues refer to as "proceeds of specified unlawful activity," 42 U.S.C. § 1956, or "criminally derived property,"

42 U.S.C. § 1957.[1] Both courts held that money laundering criminalizes a transaction in proceeds, not the transaction that creates the proceeds. Bank fraud does not generate its proceeds until after execution. Wire fraud often does not give rise to proceeds until after a wire transfer. These cases stand for the rule that the predicate offenses must produce proceeds before anyone can launder those proceeds.

When, then, does mail fraud produce proceeds? In two seminal mail fraud cases the Supreme Court has explained that a fraud scheme can produce proceeds long before the mailing that triggers federal jurisdiction. In *United States v. Sampson*, 371 U.S. 75 (1962), the Court reinstated a number of mail fraud counts after the district court dismissed them on the ground that the mailings were not for the purpose of executing a business fraud scheme. In the scam the defendants solicited business, accepted applications for service, obtained payment, and then mailed out official acceptances to the victims. Importantly, the defendants obtained all the money they expected to ever get from each victim before ever using the mails. The *Sampson* Court explained that this conduct could constitute mail fraud because the defendants contemplated that the mailed acceptances would lull the victims into believing that the defendants would faithfully perform the paid-for services. *See id.* at 79-81. The Court reached much the same conclusion in *Schmuck v. United States*, 489 U.S. 705 (1989). In *Schmuck*, the Court affirmed a mail fraud conviction arising out of a used car fraud operation. In the scheme,

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[1] While the two statutes use different terminology, we believe their general similarity of purpose allows us to apply the logic of *Christo* and *Johnson* to this case. We might face a more difficult question if we were dealing with an issue that revolved around the precise meaning of "proceeds" as opposed to "criminally derived property." *But see United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995) (concluding that "'criminally derived property' under § 1957 is equivalent to 'proceeds' under § 1956"), *cert. denied*, 516 U.S. 1136 (1996).

Schmuck rolled back the odometers on used cars and then sold the cars to dealers. When the dealers sold the cars to retail customers, they would mail a title application to the state. The Court ruled that, even though Schmuck had long since obtained his money, the mailing arguably furthered his scheme by maintaining his successful, long-term relationship with the car dealers. *See id.* at 710-15.

Thus, in both *Sampson* and *Schmuck*, the Supreme Court held that the mailing in a mail fraud case may further the fraudulent scheme even if it occurs long after the scheme generates proceeds. In both cases, the mailings achieved an important purpose -- they preserved the appearance of propriety, even if they did not actively cause the loss of money. *See United States v. Brocksmith*, 991 F.2d 1363, 1367-68 (7th Cir. 1993). The mailings kept everything copacetic. In our case the mailings served the same purpose. UPEC mailed file copies of the invoices to Delta. These mailings maintained normal business operating procedures and thus furthered the fraudulent scheme. Of course by the time UPEC mailed the invoices, Mankarious and Murphy often already had cashed their kickback checks.

To sum up: Bank fraud creates proceeds only after execution. Wire fraud often creates proceeds only after a wire transfer. A mail fraud scheme, however, can create proceeds long before the mailing ever takes place. Mankarious and Murphy are asking us to suspend the operation of the money laundering laws between the time a fraud scheme obtains proceeds and the time that scheme employs the mails. None of the cases cited justifies such an incredible result. *Christo*, *Johnson*, and all the other cases compel us to keep money laundering and the predicate offenses separate. Money laundering requires proceeds of a discrete predicate crime. That predicate crime must have produced proceeds in acts distinct from the conduct that constitutes money laundering.

Nothing in our reasoning creates an irresolvable conflict with the Tenth Circuit's decision in *Kennedy*. The potential for trouble arises because *Kennedy* concerned money laundering based on mail fraud and because the opinion stated: "All that is required to violate § 1956 is a transaction meeting the statutory criteria that takes place after the underlying crime has been completed." *Kennedy*, 64 F.3d at 1477. As we read *Kennedy*, however, the Tenth Circuit was merely reaffirming the proceeds rule announced in *Johnson*—a money laundering transaction must follow and must be separate from any transaction necessary for the predicate offense to generate proceeds. The *Kennedy* court faced a case, unlike this one, in which mailing occurred before laundering. Therefore, it did not face the same situation we confront here.

In this case, the defendants' schemes generated proceeds and then Mankarious and Murphy committed separate acts to launder those proceeds. Because, as we already explained, money laundering does not focus on the specifics of the predicate offense, it does not matter when all the acts constituting the predicate offense take place. It matters only that the predicate offense has produced proceeds in transactions distinct from those transactions allegedly constituting money laundering. Therefore, on this score, we affirm the money laundering convictions.[2]

Despite all of this heavy lifting, we are not quite done with the defendants' challenge to the money laundering

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[2] Mankarious cannot be too unhappy with this outcome, however. Apparently the government did not raise either *Sampson* or *Schmuck* until appeal. Thus the government allowed the defendants' argument to sway the trial court, which dismissed Mankarious' convictions on two money laundering counts (counts 9 and 10) based on the purported timing flaw. The government does not appeal this result.

convictions. Mankarious and Murphy point out that the money laundering charges focused on transactions involving checks, rather than cash. They claim that the checks did not become "proceeds" until after being deposited or cashed. In the abstract, this is an interesting argument.[3] *But see United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996) (construing "proceeds" under § 1956 and stating that "despite defendant's suggestion, there is no doubt that the checks he received from the sales of the automobiles fall within the common understanding of 'proceeds of specified unlawful activity'"), *cert. denied*, 117 S. Ct. 691 (1997); *United States v. Li*, 856 F. Supp. 411, 416 (N.D. Ill. 1994) (finding that checks constitute proceeds under § 1956).

The money laundering charges in this case, however, do not focus on the checks obtained from Delta; instead the grand jury charged the defendants for cashing and depositing kickback checks from UPEC after Brown obtained payment from Delta. Thus the defendants' argument utterly fails. At the latest, UPEC obtained the proceeds of fraud when it deposited Delta's checks into its account. (We recognize that it takes time for checks to clear and for funds to become available, but the defendants do not claim that any of the checks in this case failed to clear. Therefore, while it might have taken some time to move the electronic funds, the funds did follow the checks.) When Brown wrote the checks in the money laundering counts he intended to cover those checks with tainted money deposited in UPEC's account. In counts 11-13, Brown wrote checks to fictitious payees in

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[3] The issue would be clearer if the government charged a jewel thief with money laundering under § 1956 based on the thief trading stolen diamonds for a Porsche. *But see United States v. Werber*, 787 F. Supp. 353, 355-57 (S.D.N.Y. 1992) (applying § 1956, defining "proceeds" broadly, and allowing a money laundering conviction based on the sale of automobiles obtained with counterfeit cashier's checks). The issue might be much easier under § 1957 because that statute refers to "criminally derived property" rather than "proceeds."

order to give Mankarious and Murphy their kickbacks. In counts 14-17, Brown wrote the kickback checks directly to one of the fireworks companies. When Mankarious cashed the kickback checks at the Brat N Beer, and when Mankarious and Murphy deposited the checks into the accounts of their fireworks companies, the defendants obtained the proceeds of crime by drawing money out of UPEC's tainted account. Therefore, the transactions in counts 11-17 all involved the eventual, surreptitious movement of dirty money. Thus we affirm the money laundering convictions in counts 11-17 without directly answering the question of whether a check (or another kind of personal property other than cash) could constitute "proceeds" under § 1956(a)(1)(B)(i).

Following their attempt to topple the money laundering convictions based on mail fraud, the defendants move on to challenge their convictions for wire fraud and for money laundering based on wire fraud. They allege, in general, that the government lacked sufficient evidence of their involvement in a scheme to defraud and that the government lacked a sufficient nexus between the invoices in question and the alleged fraudulent scheme. Regarding specific counts, the defendants contend that the government lacked evidence that the phone calls supporting counts 21 and 25 furthered a fraudulent scheme (even though those phone calls took place between Delta and MBI just hours before MBI issued kickback checks). They allege that the government has no evidence that the wire activity supporting counts 23 and 24 connect to the fraudulent scheme. And they claim that the government's proof on count 22 is insufficient because the wire transfer does not match the alleged amount of fraud. Finally, they contend that the insufficient proof of wire fraud undermines the government's proof of money laundering predicated on wire fraud in counts 26 and 27.

The government admits that there is nothing illegal about accounts receivable financing per se, but it explains that the defendants used the system to provide Green with operating capital for his fraud and to pay him inflated commissions (out of which he paid the defendants kickbacks). The government rebuts the defendants' other claims by walking through the facts and showing that the phone calls in counts 21 and 25 correlate with specific checks covering fraudulent invoices or kickbacks. This correlation supports an inference that the calls furthered the illegal conduct. Regarding count 22, the government notes that it involves a wire transfer to Sam's Trading, which according to Green's testimony performed no real work for MBI -- the transfer was a kickback. Regarding counts 23 and 24, the government explains that these wire transfers from Gamma constituted wire fraud because Green admitted that Gamma existed only to further the fraudulent scheme. Consequently, both of the money laundering counts (26 and 27) also survive because they both rest on checks from Gamma -- which used wire transfers to further its operations. While the government's case relies to some extent on inference, we do not find anything unreasonable in the jury's verdicts on counts 21-27.

Proceeding alone, Murphy challenges the sufficiency of the evidence behind all of his convictions except one of the tax fraud counts. First, Murphy alleges that he was not involved in the UPEC scheme. He admits that he appeared at a few meetings, but he contends he was convicted through guilt by association. Regarding the Green scheme, Murphy notes that Green had little to say about Murphy and that Murphy should not be held responsible for Mankarious' acts. With regard to the 1991 tax count, Murphy contends that no one testified to him receiving money during that tax year.

We easily dismiss these arguments. The government points us to several references by Brown to meetings with Mankarious *and* Murphy. The government also notes that

Murphy signed checks with Mankarious. And the government reminds us of Murphy's role in the cover-up. Regarding the Green operation, the government notes that Murphy's fireworks company invoiced Green, that Mankarious' fireworks company wrote checks to Murphy's fireworks company splitting a big kickback payment from Green, that Murphy directed Ms. Witte in running Parkfield, and that Green sent a Gamma check for Parkfield to Murphy's home. Regarding the 1991 tax fraud, the government explains that Murphy co-signed the checks Delta sent to UPEC and that Mankarious told Brown on several occasions that he split the proceeds with Murphy (although on other occasions he told Brown to keep the checks secret). Further, as the government states, Murphy's involvement in the 1992 scams and his cover-up efforts give rise to an inference that he did indeed participate equally in the 1991 portion of the scam. In short, we find the jury's verdict based on adequate evidence of Murphy's involvement in all aspects of the various offenses.

Murphy also raises three losing challenges to his tax fraud convictions. First, he contends that the trial court should have given a good faith instruction. *See Cheek v. United States*, 498 U.S. 192, 202 (1991). The government responds that Murphy introduced no evidence showing that he believed that he was complying with the law and that, because the offenses involved willfulness, a good faith instruction was unnecessary. *See United States v. Kelley*, 864 F.2d 569, 573 (7th Cir. 1989). Next, Murphy contends that the indictment required the government to prove that Murphy's tax fraud "caused him to underpay his federal income taxes." The government admits that the indictment contained this language but contends that the law requires no such proof. *See* 26 U.S.C. § 7206; *cf. Sansone v. United States*, 380 U.S. 343, 352 (1965). Furthermore, the government notes that the case law excuses the prosecution from proving the exact amount of a tax underpayment even

when the indictment specifies such an underpayment. *See United States v. Warden*, 545 F.2d 32, 36 (7th Cir. 1976). Lastly, Murphy contends that the government presented surprise evidence against him by introducing evidence of money derived from Parkfield, the money spent on the home improvements, and the money spent on gun equipment as evidence of Murphy's tax liability. The government responds by explaining that it presented this evidence to Murphy as it was discovered.

Overall, Murphy's arguments get him nowhere. We would be uncomfortable with the government's late announcement of evidence, but we suspect that Murphy's real complaint is that he didn't understand that the government would use certain mail and wire fraud evidence against him in its tax fraud case.

Mankarious also makes a challenge on his own. He complains that the trial court erred by not severing his trial from Murphy's. Mankarious focuses this argument on testimony regarding Murphy's use of contractors at his home (and Murphy's personal use of his company credit card and checkbook) and the subsequent submission of those bills to Delta. While the judge gave a limiting instruction to the jury relating to most of this testimony, Mankarious claims that the judge failed to give the instruction on every occasion and that, even with the instruction, the testimony prejudiced him. *See United States v. Moore*, 115 F.3d 1348, 1361 (7th Cir. 1997) (explaining that a defendant challenging the denial of a severance motion must establish actual prejudice resulting from the denial). Regarding prejudice, Mankarious points to the government's closing argument that Mankarious knew of Murphy's conduct and that Murphy's conduct exemplified the modus operandi of the defendants' fraudulent schemes.

The government responds that we must presume that the jury followed the limiting instruction, *see United States v.*

Richardson, 130 F.3d 765, 777 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1324 (1998), and that the jury heard the instruction often enough to understand that it needed to consider the evidence separately against each defendant on each count. The government explains that the closing argument in question focused on Murphy, not Mankarious. And the government notes that Mankarious did not object to the closing and, therefore, must show plain error.

We do not believe the district judge abused his discretion in denying severance. Quite properly, the judge repeatedly gave limiting instructions. Mankarious cannot demonstrate actual prejudice because of the overwhelming evidence against him. The few mentions of independent criminal conduct by Murphy (usually accompanied by a limiting instruction) and the brief mention of this conduct in closing cannot be said to have significantly affected Mankarious' chances of an acquittal. The trial lasted over 4 weeks, and these few glitches (if they even amount to glitches) did not prejudice Mankarious.

We have now exhausted, at long last, the defendants' attacks on their convictions, and so we turn to consider their numerous claims of improper sentencing. The first of these sentencing arguments is quite interesting. Mankarious and Murphy claim that the court should not have based the amount of loss (under U.S.S.G. §2F1.1) on the entire loss to Delta because they owned 59 percent of it and cannot steal from themselves. In other words, the defendants contend that the court should have reduced the amount of loss by 59 percent. Similarly, the defendants contend that the court should have reduced their money laundering liability by the same percentage.

The government explains that this argument might fly if Delta were a partnership. Because Delta is a separate corporate entity, however, the defendants should face liability

for the full loss. While we generally agree, we hesitate about endorsing the proposition as a blanket rule. For instance, if hypothetical defendants treated a corporation as an alter ego (in other words, if a veil-piercing argument would work against them), then we speculate that they might be able to use the theory of veil piercing as a defense. *Cf. Quinn v. Butz*, 510 F.2d 743, 759 (D.C. Cir. 1975). Nevertheless, it seems appropriate to hold a co-owning corporate embezzler responsible for the full amount of loss if the corporation follows formalities, if it has other active co-owners, and/or if the defendant in question receives a salary and benefits tightly controlled by the co-owners. We do not mean to require the presence of all these factors, nor do we mean to suggest that this list is exhaustive. This case would be very different, however, if not for the presence and role of WITECH. In this case WITECH acted as a fully participating co-owner. WITECH demanded that Delta follow corporate formalities, it helped direct Delta, and it closely monitored the compensation of Mankarious and Murphy. These factors establish that Delta constituted an entity separate from Mankarious and Murphy—the defendants stole from the company, not from themselves. Therefore, we find no error in holding them liable for the full amount of their fraud.

With regard to the money laundering, the defendants have no viable argument. The offense itself requires proof that the defendants were concealing ill-gotten gains. As the government points out, the guidelines, *see* U.S.S.G. §2S1.1(b)(2), and the case law uniformly state that offense level depends on the amount of money involved in the crime, *see United States v. Atterson*, 926 F.2d 649, 659 (7th Cir. 1991).

Continuing with their contention that the district court improperly calculated the amount of loss, the defendants contend that the Topper invoice scheme cheated Brown's

partners at UPEC & Associates, not Delta. Thus they believe that the losses from this scheme should not have been counted by the court. The government responds by explaining that the Topper scheme constituted part of the same relevant course of conduct as the offenses of conviction. The district court agreed with the government and we agree with the district court. For sentencing purposes, each of the permutations of the invoice scam represents not a distinct set of offenses but just a growth and evolution of the same scheme. Furthermore, while the Topper portion of the scheme cheated UPEC out of payment for its work, it also cheated Delta out of money. UPEC had performed work but remained unpaid and Delta had paid for work but, arguably at least, remained liable to UPEC. Therefore, the district court properly included the Topper invoices in its calculation of the amount of loss.

In yet another assault on the district court's loss calculations, the defendants argue that the court should not have counted the $50,000 returned by Mankarious when it totaled up the losses. The PSR did not include this amount and the court added it following an objection by the government. The government explains that the return of funds does not reduce loss computation because the defendants intended the loss and returned the money only because of an emerging investigation. *See United States v. Brown*, 7 F.3d 1155, 1159 (5th Cir. 1993); *cf. United States v. Mount*, 966 F.2d 262, 266 (7th Cir. 1992). We agree. The defendants not only attempted to obtain the $50,000, they actually did obtain the money.

Finally moving on to another sentencing topic, the defendants contend that the trial court improperly enhanced their offense levels under U.S.S.G. §3B1.1(c) for supervising Brown. Mankarious and Murphy claim that Brown was a co-equal participant rather than an underling. They explain that he possessed authority, he participated equally, he told

Hansen (UPEC's comptroller) to further the plot, he initially took a larger share of the proceeds, he assisted in planning and executing the scheme, and he was not controlled by Mankarious or Murphy. *See United States v. Billingsley*, 115 F.3d 458, 464 (7th Cir. 1997) (providing factors for analysis of U.S.S.G. §3B1.1(c) enhancements).

The government explains that the court permissibly looked not just to Brown's role in the scheme, but to his role in the cover-up. The government argues that during this later period Mankarious and Murphy did direct Brown and even paid him for his efforts. The government explains that, in applying the supervision enhancement, the court may look to all relevant conduct, including conduct occurring in the "course of attempting to avoid detection or responsibility for that offense." *Billingsley*, 115 F.3d at 465.

During the active period of the invoice operation, Brown certainly does appear to have acted as a co-equal player. The only facts pointing in the other direction are Brown's initial request for advice on embezzlement and Murphy's offer to teach him the craft. Once the cover-up began, however, Mankarious and Murphy assumed a dominant role. They told Brown what to do and they paid him to do it. Nothing in the sentencing guidelines requires the court to limit the enhancement for supervision to one particular period during a lengthy course of criminal conduct—even if that period lasted the longest. Since Brown's role changed from equal to underling, we believe the enhancement was properly applied.

Next the defendants argue that the court improperly enhanced their sentences for obstruction of justice under U.S.S.G. §3C1.1 based on their attempts to coach Brown regarding what he should say to the FBI. They argue that since a defense investigator subsequently discovered notes in Brown's garbage, and since the defense turned those notes over to the government, the defendants did not engage in

obstruction. They also claim that they did not obstruct justice by tipping off Green during the FBI investigation. More importantly, the defendants argue that the enhancement applies only when a defendant obstructs an ongoing investigation or proceeding, not a potential investigation. *See, e.g., United States v. Lister*, 53 F.3d 66, 69, 71 (5th Cir. 1995). Here, the defendants argue they had no knowledge of any investigation of themselves when they began the cover-up.

The government responds that the defendants misperceive the law in this circuit. In *United States v. Laurenzana*, 113 F.3d 689, 696 (7th Cir.), *cert. denied*, 118 S. Ct. 240 (1997), the court explained that materiality, rather than timing, was the crucial issue. We think the government clearly prevails. Mankarious and Murphy anticipated that the government's investigation of Green would eventually uncover evidence of crimes at Delta. They attempted to prevent the discovery of those crimes by tipping off Green and by concealing their own conduct. In other words, their efforts were directly material to the investigation of Delta, even though that investigation began later. With regard to their other claims, their helpful production of notes does not erase the past. Once they obstructed justice by launching the cover-up, no amount of angelic behavior could save them from the possibility of facing this enhancement.

Regarding the court's calculation of the tax fraud sentences, the defendants claim that the court improperly applied U.S.S.G. §2T1.1(b)(2), the enhancement for use of sophisticated means in a tax case. The PSR did not recommend this enhancement, but the government urged its application based on the defendants' total conduct in the entire scheme. The defendants contend that the sophisticated means enhancement must be tied to the offense of conviction. *See United States v. Stokes*, 998 F.2d 279, 283 (5th Cir.

1993). They claim that their conduct in committing tax fraud was simple—they just did not report their income from fraud.

As the government explains, however, the defendants' scheme had the dual effect of creating illicit gain and hiding that gain from the IRS. The court thus permissibly applied this enhancement. Whether or not the defendants consciously intended it, the scheme itself would have thwarted IRS from successfully auditing the defendants and determining their real income. We think that the scheme constituted a sophisticated means of tax fraud, even if that was not its primary purpose. Therefore, the sophisticate means enhancement did relate to the offense of conviction.

The defendants next attempt to revive their sufficiency of the evidence claim as a sentencing argument by attacking the court's determination that their participation in Green's scheme began in April of 1992 rather than in May. The government refutes this contention by pointing to Green's testimony. Since the jury convicted the defendants on all counts, we conclude that it found Green's testimony credible. Therefore, the district court properly relied on this testimony to fix the starting date of the defendants' conduct.

In another attempt to convert their sufficiency of the evidence arguments into a sentencing issue, the defendants contend that the court improperly enhanced their sentences for the relevant conduct of receiving stolen aluminum. The defendants explain that the court dismissed two receiving stolen property counts from the indictment before trial. Furthermore, they argue that Green did not steal all the aluminum—only the portion not paid for at the end of the Ponzi scheme. And the defendants note that one of their witnesses testified that Delta actually paid a premium price for the aluminum. The government rebuts this claim by noting that Green testified that he sold Delta stolen aluminum and that the original producer of the aluminum testified that

Green stole the metal from his company. The court clearly heard sufficient evidence to justify its relevant conduct finding.

Turning their attention from upward enhancements to downward departures, the defendants claim that the court misperceived its ability to depart because it believed that the defendants' conduct fell within the heartland of the money laundering offense. The defendants explain that money laundering covers attempts to launder illicit money, not to subsequent transactions involving washed funds. *See United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474 (11th Cir. 1994). They seem to believe that their cashing and depositing of checks constituted a subsequent transaction in laundered money rather than the laundering transaction itself. On the contrary, we think that the defendants did launder the money. While they did not legitimate dirty money, they did move dirty money from an auditable account into hiding. Thus their conduct falls under the statute's coverage of attempts to conceal the ill-gotten proceeds of crime.

In their penultimate argument, the defendants contend that the trial judge wrongly believed that he lacked the ability to depart because of the defendants' disparate treatment compared to other participants in the various schemes. The government, however, notes that these other participants cooperated with the government and that Judge Randa stated that he felt that downward departure would undermine efforts to reward individuals for cooperating with the government. The defendants make a good case based on a speech Randa gave regarding congressional intent to limit the discretion of judges. The government, however, points to other remarks suggesting that the judge did exercise his discretion and simply refused to depart. The government correctly identifies comments in which the judge explained his refusal, as opposed to his inability, to depart. The judge's exercise of

his discretion prevents review. *See United States v. Wright*, 37 F.3d 358, 360-61 (7th Cir. 1994).

Finally, Murphy contends that the court improperly attributed Parkfield's income and the gun equipment purchases to him when it calculated his tax liability. He alleges that he did not own Parkfield, and he claims that the guns constituted legitimate business expenditures. As the government correctly points out, however, Murphy controlled Parkfield and he kept the guns at home as part of his personal collection. Therefore, the financial gains from these two sources plausibly constitute income to Murphy.

Having found no basis to either reverse the defendants' convictions or to recalculate their sentences, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 95-CR-96

SAMY A. MANKARIOUS and
THOMAS K. MURPHY,

Defendants.

TRANSCRIPT OF
SEPTEMBER 3, 1996 PROCEEDINGS

THE CLERK: Case No. 95-CR-, 96 United States of America VS. Samy Mankarious and Thomas Murphy. Called for continuation of the jury trial. May I have the appearances, please? First for the Government.

MR. WALL: Joseph Wall, Francis Schmitz, for the United States.

MR. BROWN: Thomas Brown appears on behalf of the Defendant, Samy Mankarious, who appears in person.

MR. MITCHELL: Terry Mitchell and James Mathie appear on behalf of Thomas Murphy, who is in court.

THE COURT: Good morning. When we left Friday, the Court heard arguments relative to the motions to dismiss Counts 9 through 17. The Court took it under advisement. The Court reviewed the authorities that were argued, the letters that were submitted post-hearing on Friday relative to the Government's position on 404(b) evidence, and the Court denied the motion. I didn't draft anything in writing because, in essence, what the Court did is adopted the Government's position. And the position being that a scheme to defraud is what has to be proven here, and accepting as the controlling authority -- although it's not, as argued, directly on point, United States v. Jackson and the Gabel case which indicates that the nature, time of earlier crimes, is immaterial relative to proceeds.

And then there is the Kennedy case from the Tenth Circuit which the -- which seems to suggest that. And the Court, given all of that, has denied the motions and will proceed on that basis and also under the standard that it is perhaps better for the jury to consider these issues at this juncture. And there may well be a not guilty finding on these counts. And if there is, that disposes of it. If not, the motions can be renewed at the -- at a later date also under Rule 29. So that's the Court's -- or the record now is made clear relative to the Court's decision. And is there anything else that we should discuss on this at this juncture?

MR. BROWN: Yes, Judge. Maybe I am dense. I apologize. I am not arguing with the Court's ruling, but I think I need to make sure the record is clear if there were to be an appeal. And also the record is clear because Mr. Mathie is in the process of attempting to draft some jury instructions for this matter. And I think I need to know a little bit more specificity as to the Court's ruling. I don't know whether the Court's ruling says that a mailing doesn't need to occur. That a scheme to defraud -- that is general scheme to defraud is sufficient. Or whether a mailing needs

to occur. If the Court determines that a mailing needs to occur, then I think we need it on the record as to whether that mailing does or doesn't have to occur.

I think I am hearing you, that your position is it doesn't. But it's not crystal clear to me whether that mailing has to occur before the financial transaction alleged in the money laundering count, or whether it doesn't.

And then, finally, which you may choose not to do, obviously, but I would ask the Court to indicate on the record if a mailing is required, irrespective of whatever timing decision that you have made. What mailing or mailings the Court's relying on relative to allowing it to go to the jury. Because that's going to have some impact relative to our defense and so forth.

So --I mean, obviously you're the boss. You wear the black robe. You can either answer those questions or not. I am not in a position to demand it, Judge, but I think in fairness to the record, that I need to have that on the record at some point in time so that there is a clear record if there should have to be a requirement for appeal.

THE COURT: One, the Court does think there has to be a mailing. There has to be a scheme to defraud. And the scheme to defraud has to connect with the mails. And the argument of the Government throughout has been that it can be from time "X" to time "Y" and anytime within there. If there is a mailing that's made, that is proven up relative to the elements of the offense, then -- and the jury accepts that this mailing is part of this grand scheme to defraud, why, then any proceeds that come from that, even if the specific instance as we've got in Counts 9 through 17 -- there isn't a specific mailing connected to that, that those proceeds can be deemed to be a part of the scheme to defraud.

MR. BROWN: Even if that mailing were to occur after those proceeds?

THE COURT: The Court looked at that, and I -- if you will recall, I indicated how do you defend against something like that? And the authority seems to suggest that you have to look at the Indictment which outlines the scheme to defraud, and the open file policy. And all these -- even the 404(b) evidence, as has been submitted, if that is established -- and at this juncture the Court is saying that the jury can from the evidence infer that a scheme to defraud from these different mailings has occurred. If that's established, then the Government can argue that the Defendants are guilty on these counts that we're arguing about, 9 through 17.

MR. BROWN: And obviously --

THE COURT: And I don't want to misstate the Government's position, but I think that's the Government's position.

MR. WALL: It is, Your Honor. Our proposed jury instructions require the jury to find the mailing, and a mailing in furtherance of the scheme. Propose that in our instructions. That the jury has to find it. Otherwise all you have is a fraud scheme. You don't have a mail fraud scheme.

THE COURT: And looking at reviewing Jackson, again, and Gabel, and as was argued on Friday, we don't have the exact facts of this case in there. And I know you started out your argument, Mr. Brown, by arguing the facts are all important here because this is what distinguishes this case from the others. But the Court's not prepared to say that that's the case right now. And I think it's better to go to the jury at this juncture. And you can renew the motion later.

MR. BROWN: I understand, Judge. If we were to submit a jury instruction that required the jury to find that a mailing occurred before the financial transaction, as I understand the Court's ruling, that jury instruction would not be given?

THE COURT: That's right.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 95-CR-96

SAMY A. MANKARIOUS and
THOMAS K. MURPHY,

Defendants.

ORDER

Defendants, Samy A. Mankarious and Thomas K. Murphy (hereinafter "Mankarious" and "Murphy"), move the Court for judgments of acquittal pursuant to FRCP 29(c), and alternatively for new trial pursuant to FRCP 33. Specifically, Mankarious seeks judgment of acquittal on Counts 9-15, 21-25 and 27-29. Alternatively, he seeks a new trial on all of these counts. Murphy seeks judgment of acquittal on

Counts 16-17, 21-26, and 30-31. Alternatively, he seeks a new trial on all of these counts.

The Court, having reviewed the briefs submitted on the motions, and having ruled on many, if not most of the legal issues raised in these motions during the course of trial, and applying the standards of review contained in US v. Hagan, 913 F.2d 1278 (7th Cir. 1990) and US v. Theodosopoulos, 487 F.3d 1438 (7th Cir. 1995), rules as follows.

Mankarious' and Murphy's motions are denied as to all Counts except Counts 9 and 10 relating to Mankarious. The Court finds nothing in the law nor the facts cited by the defendants that convinces it that the jury verdicts should be overturned or that the defendants are entitled to a new trial in the interests of justice. Having previously accepted the rationale offered by the government during trial and adopting it now, the Court will dismiss Counts 9 and 10 relating to Mankarious.

In all other respects the verdict as rendered by the jury will stand.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The verdict rendered by the jury as to defendants Mankarious and Murphy will stand as to all counts except Counts 9 and 10 as they relate to Mankarious.

2. Counts 9 and 10 as they relate to Mankarious are **DISMISSED**.

3. Mankarious' and Murphy's motions for a new trial are **DENIED**.

Dated at Milwaukee, Wisconsin, this 28th day of February, 1997.

SO ORDERED,

HON. RUDOLPH T. RANDA
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 95-CR-96

SAMY A. MANKARIOUS and
THOMAS K. MURPHY,

Defendants.

ORDER

On May 28, 1997, the defendants, Samy A. Mankarious and Thomas K. Murphy (hereinafter "defendants"), filed a "Motion to Provide Grand Jury Materials" requesting access to all grand jury transcripts, and other information relating to

what has become known as the MBI wire fraud and money laundering charges. On June 27, 1997, the government provided defense counsel with all grand jury transcripts concerning the Superseding Indictment returned against the defendants on September 1, 1995. Based on the defendants' review of those materials and the government's May 6, 1996 motion to amend and strike surplusage in the Superseding Indictment of September 1, 1995, the defendants ask the Court to vacate their convictions on and dismiss Counts 21-25 (the wire fraud counts), and the money laundering charges contained in Counts 26 and 27. The defendants contend that the government improperly amended the Superseding Indictment by removing the specific reference to a "bogus invoices" scheme in the preamble to said indictment. By doing so, the government broadened the indictment to charge Mankarious and Murphy with wire fraud by means of *any* scheme. "By changing the preamble, the government changed the scheme, an essential element of the crime of wire fraud. This impermissible amendment, in combination with the government's narrowly-drafted indictment, allowed the jury to convict the defendants on broader bases from that which appeared and supported the offenses charged in the indictment, all in violation of their Fifth Amendment rights to be tried only on the charges contained in the indictment." (Defendants' Motion to Vacate Conviction at p. 10).

On May 6, 1996, the government filed its motion to amend and strike surplusage in the Superseding Indictment. In its motion, the government pointed out that:

> The wire fraud scheme as currently charged encompasses three separate ways the grand jury alleges the defendants defrauded Delta Group: (1) fraudulent and inflated invoices involved in commission kick-backs from Metal Brokers Inc. to Samy Mankarious and Tom Murphy through distributions to business entities they personally controlled; (2) fraudulent invoices for

aluminum sold by Metal Brokers to Delta Group; and (3) payments by Delta to Metal Brokers for aluminum Metal Brokers allegedly shipped on behalf of Delta -- payments which were then partially kicked-back to Mankarious and Murphy through distributions to business entities they personally controlled. The government's motion will eliminate the second aspect of the wire fraud, and therefore limit and narrow the charges against these defendants.

The Court dismissed defendants' motions at the time of sentencing and incorporates as part of this written decision the remarks made there.

The government's amendment was to the preamble to the actual wire fraud counts. It did not alter the nature or the specifics of any of the indictment counts nor change the elements of the offense. In this regard the government properly relies upon U.S. v. Quintanilla, 2 F.3d 14699 (7th Cir. 1993), as authority for its actions. See also, U.S. v. Miller, 471 U.S. 130 (1985).

With regard to the evidence presented to the grand jury, the Court has reviewed that evidence and rules as follows (again incorporating any oral pronouncements made at the July 29, 1997 sentencing hearing).

The grand jury heard testimony concerning a broad range of mail and wire fraud schemes covered by false or fraudulent invoices. This was generally and in the Courts view clearly presented to the defendants in discovery. Agent Tom Walkner's testimony is replete with the multitude of ways the defendants went about their financial legerdemain and the government attorney made the defendants' action plain to the grand jury.

The amended indictment did not allow the jury to convict the defendants on bases broader than that which appeared in and supported the offenses charged in the indictment.

The defendants' motion to dismiss Counts 21-25 (the wire fraud counts) and 26 and 27 (the money launder counts) is **DISMISSED**.

Dated at Milwaukee, Wisconsin, this 27th day of August, 1997.

SO ORDERED,

HON. RUDOLPH T. RANDA
U.S. District Judge

UNITED STATES CONSTITUTION
FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensaiton.

18 U.S.C. § 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1956. Laundering of monetary instruments.

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity --

* * * * *

(B) knowing that the transaction is designed in whole or in part --

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine or not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 95-CR-96

SAMY A. MANKARIOUS,
THOMAS K. MURPHY,
DELTA GROUP, INC. and
NORMAN J. LoPRESTO, JR.,

Defendants.

AFFIDAVIT OF TERRY E. MITCHELL

STATE OF WISCONSIN)
(SS
MILWAUKEE COUNTY)

Terry E. Mitchell, first being duly sworn on oath, deposes and states:

1. I am an attorney licensed to practice in the State of Wisconsin and I have represented defendant Thomas K. Murphy (Murphy) in the above-captioned action since February 17, 1994.

2. I make this affidavit in support of a joint defense motion filed with the court on behalf of defendants Samy A. Mankarious and Murphy.

3. I herewith submit to the court with this affidavit the following grand jury transcripts that have been turned over to the defense by the U.S. Attorney's office. These transcripts are in chronological order, not alphabetical order:

Date	Witness	AUSA	Court Reporter
10/20/92	Thomas La Rose	F.D. Schmitz	T. Bucko
10/20/92	David A. Gorr	F.D. Schmitz	T. Bucko
11/17/92	David A. Gorr	F.D. Schmitz D.T. Flaherty	T. Bucko
12/01/92	David A. Gorr	F.D. Schmitz	K.L. Pierce
12/15/92	Allen Greenberg	D.T. Flaherty	C.A. Humpal
12/15/92	Raymond Gabor	D.T. Flaherty	C.A. Humpal
12/15/92	David A. Gorr	D.T. Flaherty	C.A. Humpal
03/03/93	Phillip Eckert	F.D. Schmitz	S.K. Beyer
03/03/93	Julie Witte	F.D. Schmitz	S.K. Beyer
03/01/94	Thomas P. Walkner	D.T. Flaherty	K. Malsom-McDermid
03/01/94	Stephanie Paparesta	D.T. Flaherty	K. Malsom-McDermid
06/07/94	Roger K. Green	D.T. Flaherty	K. Malsom-McDermid
06/21/94	Roger K. Green	D.T. Flaherty	J. Ellingson

09/20/94	Thomas Lepak Edward Shilling Mark Teloh Kevin Archambeau	D.T. Flaherty F.D. Schmitz	J.L. Mau
12/06/94	Thomas P. Walkner	D.T. Flaherty F.D. Schmitz	B.A. Horne
12/20/94	Thomas P. Walkner	D.T. Flaherty	M.J. Lermer
01/18/95	Thomas P. Walkner	D.T. Flaherty	K. Malsom-McDermid
05/25/95	Thomas P. Walkner	D.T. Flaherty F.D. Schmitz	B.A. Horne
09/01/95	D.T. Flaherty Colloquy	D.T. Flaherty	K. Malsom-McDermid
09/01/95	Agent Walkner	D.T. Flaherty	K. Malsom-McDermid

4. Several of these transcripts were not provided to the defense until June 1997, long after the trial. The transcript of Agent Walkner's testimony dated September 1, 1995, the day the superseding indictment was returned was received on June 12, 1997. The transcript of the colloquy of AUSA Daniel Flaherty with the grand jury on September 1, 1995 was received on June 27, 1997. AUSA Flaherty's colloquy is the companion to Special Agent Thomas Walker's testimony on that day.

5. Special Agent Thomas Walkner was a government's witness called at the trial. His grand jury testimony relative to the superseding indictment, which expanded the charges against the defendant from 13 counts to 31 counts, was not provided to the defense prior to Agent Walkner's trial testimony.

6. On May 6, 1996, the U.S. Attorney's office made its "Motion to Amend Indictment" to strike surplusage in the superseding indictment in Section V, the description of the invoice kickback scheme to defraud utilizing Metal Brokers International and Gamma Metals. At the time of that motion, the defense did not have any of the grand jury transcripts and specifically did not have either of the transcripts from the September 1, 1995 superseding indictment.

7. I have reviewed all of the above identified transcripts in their entirety to determine whether the theory of prosecution presented at trial was ever presented to or considered by the grand jury in the original indictment (May 25, 1995), or in the superseding indictment (September 1, 1995). My review of transcripts of Agent Walkner on March 1, 1994, December 6, 1994, December 20, 1994, January 18, 1995, May 25, 1995, and of Roger Green on June 7, 1994 and June 21, 1994, did not find any testimony which supported the government's theory of prosecution advanced by their May 6, 1996 motion. Additionally, neither the September 1, 1995 transcript of AUSA Flaherty's colloquy explaining the superseding indictment nor the September 1, 1995 transcript of Agent Walkner's testimony supports the government's stated theories.

8. Nothing in these grand jury transcripts of Agent Walkner, Roger Green or AUSA Flaherty describes any payment of commissions as part of an illegal or fraudulent scheme. Further, nothing describes "account receivable financing" in these transcripts as part of an illegal or fraudulent scheme between Roger Green and Metal Brokers International and the defendants.

9. The U.S. Attorney's office has represented to the defense that these grand jury transcripts represent the

entirety of the evidence presented to the grand jury regarding the indictments returned against defendants Samy A. Mankarious and Thomas K. Murphy in this case.

Dated this 21st day of July, 1997.

TERRY E. MITCHELL

Subscribed and sworn to before me
this 21st day of July, 1997.

Notary Public, State of Wisconsin
My commission is permanent.
m&msctappendix